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Supreme Court, U.S.
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No. 08-140

IN THE

# Supreme Court of the United States

TAMARA THOMPSON and
DISABLED RIGHTS ACTION COMMITTEE,

*Petitioners,*

*v.*

MICHAEL E. TURK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the private enforcement of the Fair Housing Act is limited by a statute of repose (and not a statute of limitations) for claims brought alleging a discriminatory housing practice (in violation of 42 U.S.C. § 3604(f)(2)) where the alleged discrimination is a failure to design and construct multifamily housing to meet the accessibility requirements set forth at 42 U.S.C. § 3604(f)(3)(C).

2. Whether the "continuing violations doctrine" applies to the private enforcement of the Fair Housing Act so that a discriminatory housing practice does not "terminate" as long as the discriminatory conditions remain extant.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

*Petitioners*

Petitioner Tamara Thompson is an individual citizen of the United States, residing in Nevada. Tamara Thompson is a member of Disabled Rights Action Committee, but has no other corporate affiliations. Tamara Thompson was a Plaintiff in the District Court, and an Appellant in the Ninth Circuit Court of Appeals.

Petitioner Disabled Rights Action Committee is a Utah nonprofit corporation. Disabled Rights Action Committee has no stock – it is a member-controlled corporation. Disabled Rights Action Committee has no corporate affiliations. Disabled Rights Action Committee was a Plaintiff in the District Court, and an Appellant in the Ninth Circuit Court of Appeals.

*Respondent*

Respondent Michael E. Turk is an individual citizen of the United States, residing in California. Michael E. Turk was an officer of Gohres Construction Company and of Rancho Del Norte Villas, Inc. in 1997. Michael E. Turk was a Defendant in the District Court, and an Appellee in the Ninth Circuit Court of Appeals.

Because the Ninth Circuit consolidated for decision (and for *en banc* oral argument) the appeal of petitioners Thompson and Disabled Rights Action Committee with another case (*Garcia v. Brockway* (Ninth Circuit Docket number 05-35647)), additional parties are identified as Respondents.

Noll Garcia was the Plaintiff-Appellant in *Garcia v. Brockway*.

State Farm Fire and Casualty Company was an Intervenor-Appellee in *Garcia v. Brockway*.

Dennis Brockway was a Defendant-Appellee in *Garcia v. Brockway*.

Robert Stewart was a Defendant-Appellee in *Garcia v. Brockway*.

Stewart Miles & Associates was a Defendant-Appellee in *Garcia v. Brockway*.

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Tamara Thompson and Disabled Rights Action Committee respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The Ninth Circuit opinion (App. A at 1a) is a consolidated opinion. It is reported as *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008). The opinion of the district court (App. B at 49a) is not a reported decision.

## STATEMENT OF JURISDICTION

The *en banc* judgment of the Ninth Circuit Court of Appeals was entered on May 13, 2008 (App. A at 2a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves statutory provisions of the Fair Housing Act (codified at 42 U.S.C. § 3601, *et seq.*) ("FHA"). Hereinafter, all section references (unless otherwise noted) are to Title 42 of the United States Code.

A. The FHA's statute of limitations for citizen suits provides that:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

§ 3613(a)(1)(A).

B. The FHA's definitions provide that an:

> "Aggrieved person" includes any person who —
>
> (1) claims to have been injured by a discriminatory housing practice; or

> (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

§ 3602(i)(1).

C. The FHA's definitions further provide that:

> "Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, or 818.[1]

§ 3602(f).

D. The FHA makes it unlawful, *inter alia*:

> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of —
>
> (A) that person; or
>
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
>
> (C) any person associated with that person.

§ 3604(f)(2).

---

1. Such sections are codified at § 3604, § 3605, § 3606, and § 3617.

E. The FHA (at § 3604(f)(3)) provides that:

> For the purposes of this subsection, discrimination includes —
>
> (A) * * *;
>
> (B) * * *; or
>
> (C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that to design and construct those dwellings in such a manner that:
>
> > (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
> >
> > (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
> >
> > (iii) all premises within such dwellings contain the following features of adaptive design:

> (I) an accessible route through the dwelling;
>
> (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
>
> (III) reinforcements in bathroom walls to allow later installation of grab bars; and
>
> (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

§ 3604(f)(3).

## STATEMENT OF THE CASE

Michael E. Turk was an officer of Gohres Construction Company and Rancho Del Norte Villas, Inc., the corporations which built "The Villas at Rancho del Norte" ("the Villas") in 1997.

In 2004, plaintiff Tamara Thompson (a member of Disabled Rights Action Committee ("DRAC")) visited the Villas where she encountered physical barriers to access. Within a year of Ms. Thompson's visit to the Villas, DRAC and Ms. Thompson filed a lawsuit against Mr. Turk (as well as others who took part in the design and construction of the Villas). The district court dismissed the complaint as time-barred and *expressly* held that "the statute of limitations provided by

Congress in § 3613 should be construed [as] a *statute of repose* for Defendants." App. B at 65a (emphasis added). Moreover, the District Court recognized that the continuing violation doctrine is generally applicable to the FHA (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)), but crafted an exception with regard to discriminatory housing practices occasioned by discrimination as defined at § 3604(f)(3)(C). App. B at 57a-58a.

DRAC and Ms. Thompson filed a timely appeal and (after briefing and oral argument), the panel assigned to the case affirmed the district court's dismissal by a 2-1 majority.

Thompson and DRAC requested rehearing *en banc*, noting significant inconsistencies between the panel's decision and both the language of the statute and this Court's decisions.

Citing *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 200-201 (1997), Petitioners noted that the Ninth Circuit's construction of § 3613(a)(1)(A) as a statute of repose was inconsistent with the standard rule that a limitations period will not begin to run until the plaintiff has a complete and present cause of action. Citing *Curtis v. Loether*, 415 U.S. 189, 195 (1974) and *Meyer v. Holley*, 537 U.S. 280, 285 (2003), Petitioners further noted that the panel decision's excepting a claim under the FHA from the standard rules for tort claims (*Garcia v. Brockway*, 526 F.3d 456, 464 (9th Cir. 2008)) was contrary to this Court's precedent.

Most fundamentally, however, Petitioners refuted the panel decision's rationale for its decision to ignore the plain structure of the statute, which shows that § 3604(f)(3)(C) merely sets forth a definition of discrimination, but not an actionable "discriminatory housing practice." Such rationale was that conformance with the plain language of the statute would hinder the enforcement of the FHA by the Attorney General, but Petitioners set forth the inaccuracy of the panel decision's rationale.

The Ninth Circuit ordered that the case be reheard *en banc*. Subsequently, five amicus briefs were filed.

(1) Brief of Amici Curiae AARP; National Fair Housing Alliance, Inc.; Paralyzed Veterans of America; National Spinal Cord Injury Association, Inc.; The Epilepsy Foundation; International Association of Official Human Rights Agencies (IAOHRA); The ARC of the United States in Support of Appellants and Urging Reversal;

(2) Brief of Amici Curiae Silver State Fair Housing Council, Inc., Nevada Disability Advocacy and law Center, Disability Rights Education and Defense Fund, Inc., Disability Rights Advocates, National Disability Rights Network, The Impact Fund, Protection and Advocacy, Inc., and law Professors Robert G. Schwemm, Michael P. Seng, and Michael Evans in Support of Appellants Noll Garcia, Tamara Thompson, and Disabled Rights Action Committee.

(3) Brief of Amici Curiae The California Building Industry Association, California Chamber of Commerce, and California Business Properties Association in Support of Appellees and Urging Affirmance;

(4) Brief of Amici Curiae National Multi Housing Council and National Apartment Association in Support of Appellees and Urging Affirmance; and

(5) Brief of Amicus Curiae Idaho Association of Realtors in Support of Appellees.

After oral argument, the Ninth Circuit issued an *en banc* decision that essentially adopted the original panel decision. While minor technical changes were made, the criticisms of the original panel decision that Petitioners presented in their petition for rehearing *en banc* were not addressed by the Ninth Circuit.

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH A DECISION OF THIS COURT, WITH DECISIONS OF TEN OTHER CIRCUITS, AND WITH NATIONALLY APPLICABLE ADMINISTRATIVE GUIDANCE.

*City of Edmonds v. Oxford House*, 514 U.S. 725 (1995) concerned a discriminatory housing practice (one made unlawful under § 3604(f)(1)(A)) and discrimination as defined under § 3604(f)(3)(B). *Id.* at 729. In *City of Edmonds*, this Court applied the plain language of § 3604(f) and treated one of the definitions of discrimination provided at § 3604(f)(3) as subordinate to the discriminatory housing practices described in § 3604(f). *Id.* at 729.

Even though the relation between the definitions provided at § 3604(f)(3) and the discriminatory housing practices described in § 3604(f) is of crucial significance to deciding the questions presented, the Ninth Circuit limited its discussion of such relationship to a footnote. *See Garcia*, 526 F.3d at 461 (fn. 1).

Eleven Circuit Courts of Appeal (*including the Ninth Circuit*) have construed the definition provided at § 3604(f)(3)(B)) as subordinate to the discriminatory housing practices described in § 3604(f)(1) and in § 3604(f)(2). See *Reg'l Econ. Cmty. Action Program v. City of Middleton*, 29 F.3d 35, 45 (2nd Cir. 2002) (subordinate to § 3604(f)(1)); *Shapiro v. Camden Towers, Inc.*, 51 F.3d 328, 333 (2nd Cir. 1995) (subordinate to

§ 3604(f)(2)); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1102-03 (3rd Cir. 1996) (subordinate to § 3604(f)(1)); *Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442, 456 (3rd Cir. 2002) (subordinate to § 3604(f)(2)); *Bryant Woods Inn v. Howard County*, 124 F.3d 597, 602-03 (4th Cir. 1997) (subordinate to § 3604(f)(1)); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996) (subordinate to § 3604(f)(1)); *Smith & Lee Associates v. City of Taylor*, 102 F.3d 781, 790 (6th Cir. 1996) (subordinate to § 3604(f)(1)); *United States v. City of Palatine*, 37 F.3d 1230, 1232 (7th Cir. 1994) (subordinate to § 3604(f)(1)); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 250 (8th Cir. 1996) (subordinate to § 3604(f)(2)); *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. 1994) (subordinate to § 3604(f)(2)); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1498, 1501 (10th Cir. 1995) (subordinate to both § 3604(f)(1) and § 3604(f)(2)); *Ackerman v. Deaf and Hearing Connection of Tampa Bay, Inc.*, 197 Fed.Appx. 879, 881 (11th Cir. 2006) (subordinate to both § 3604(f)(1) and § 3604(f)(2)); and *Samaritan Inns v. District of Columbia*, 114 F.3d 1227, 1231-32 (D.C. Cir. 1997) (subordinate to § 3604(f)(1)).

Moreover, the Sixth Circuit has held that § 3604(f)(3)(C) is subordinate to the discriminatory housing practices described in § 3604(f). *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469 (6th Cir. Dec. 15, 2006) cert. denied 128 S. Ct. 880 (2008).

Alternatively, if discrimination as defined under § 3604(f)(3)(C) is properly considered to set forth a "discriminatory housing practice" that contstitutes an *actionable* "unlawful act," then the Ninth Circuit has entered a decision on an important question of federal law

in a manner that is in *direct* conflict with HUD's interpretation of the FHA.

## II. THE DECISION OF THE NINTH CIRCUIT IS INCORRECT.

### A. The Plain Language Of § 3604 Shows That § 3604(f)(3)(C) Is Not An Actionable "Discriminatory Housing Practice."

#### 1. The statutory structure is clear.

When interpreting statutes, courts start with the plain language of the statute. *See Patterson v. Shumate*, 504 U.S. 753, 757-59 (1992). Critical to the resolution of both questions presented is the relationship between the definitions of discrimination set forth at § 3604(f)(3) and the unlawful discriminatory housing practices set forth at § 3604(f)(1) and § 3604(f)(2).

Under § 3604(f)(2), it is unlawful to discriminate against a disabled person "in the terms, conditions, or privileges[2] of sale or rental of a dwelling" or "in the provision of services or facilities in connection with such dwelling."

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2. This Court has held that "[t]he phrase 'terms, conditions, or privileges of employment'" is not limited to "'terms' and 'conditions' in the narrow contractual sense." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115-116 (2002). The "terms, conditions, or privileges" occasioned by a failure to design and construct in an accessible manner are not contractual. They are, instead, structural. Such structural conditions have been found by Congress to constitute the practical equivalent of a "posted sign saying 'No Handicapped People Allowed.'" H.R. REP. No. 711, 100th Cong., 2nd Sess. (1988), at 25, reprinted in 1988 U.S.C.C.A.N. 2173, 2186.

The introductory line of § 3604(f)(3) clearly states: "For the purposes of this subsection, discrimination includes.[3]" Thus, it is abundantly clear that § 3604(f)(3) presents three definitions of "discrimination" that serve to help *define* discrimination for the purpose of § 3604(f)(1) and § 3604(f)(2). Such definitions set forth at § 3604(f)(3) are not "unlawful" in and of themselves: While a failure to meet the standard of care set forth at § 3604(f)(3)(C) is "discrimination" (for the purpose of § 3604(f)(1) and § 3604(f)(2)), such failure is not "unlawful" according to a plain reading of § 3604 and does not – in and of itself – constitute a cause of action. Quite simply, mere "discrimination" is not the same as a "discriminatory housing practice."

### 2. The Ninth Circuit's public policy considerations do not override the statute's plain language.

The Ninth Circuit based its decision on a belief that "treating (f)(3)(C) as subordinate [to (f)(1) and (f)(2)] makes no structural sense." *Garcia*, 526 F.3d at 461 (fn 1). The Ninth Circuit, however, failed to reconcile its holding with the "structural sense" that has been noted by this Court (and by ten Circuit Courts of Appeals other than the Ninth Circuit itself) with regard to § 3604(f)(3)(B). Such failure continued even after the logical shortcoming of the Ninth Circuit's decision was identified in a petition for rehearing *en banc*. Rather than provide a rationale whereby the statutory

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3. The use of the word "includes" is characteristic of a definition provision. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:7, p. 305 (7th ed. 2007).

structure would dictate that discrimination defined at § 3604(f)(3)(C) should be treated differently than discrimination defined at § 3604(f)(3)(B), the Ninth Circuit decision (in a mere footnote) presented its own policy considerations.

In particular, the Ninth Circuit supported divergence from the plain language of the statute based upon a belief that adherence to the plain language of the FHA:

> would make it impossible, or at least more difficult, for the Attorney General to bring a design and construction claim against builders under 42 U.S.C. § 3614(a), because design and construction of an FHA-noncompliant building alone would not, under the dissent's interpretation, be actionable under the FHA. The dissent's interpretation therefore may help a few FHA plaintiffs today, but it could harm many more people living in FHA-noncompliant units in the future.

*Garcia*, 526 F.3d at 461 (fn. 1).

A plain reading of § 3614(a), however, shows that the Attorney General's authority to bring suit is not limited to situations where there is an "alleged discriminatory housing practice" (as is required of private litigants under § 3613(a)(1)(A)). Rather, the Attorney General may commence a civil action based upon a "reasonable cause to believe that any person or persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by

[the Fair Housing Act]." While the construction of inaccessible housing is (in and of itself) not an unlawful "discriminatory housing practice," such construction certainly constitutes "resistance to the full enjoyment of" rights granted by the FHA. Moreover, the Attorney General (again, with "reasonable cause to believe") may commence a civil action under § 3614(a) where "any group of persons has been denied any of the rights granted by [the FHA] and such denial raises an issue of general public importance." In the hypothetical situation presented by the Ninth Circuit, the "people living in FHA-noncompliant units" would be the very "group of persons" regarding whom the Attorney General can bring a suit.

Finally, even if the language of § 3614(a) (together with a construction of § 3604(f) that is consistent with its plain language) could somehow be read to support a limitation on FHA enforcement by the Attorney General, the Ninth Circuit overlooks the comparative importance of private enforcement and the Attorney General's enforcement of the FHA. Indeed, in *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972), this Court noted that "the enormity of the task makes the role of the Attorney General *minimal*, [so] the main generating force must be private suits." *Id.* at 209, 211 (emphasis added). Quite simply, the judicial amendment of the FHA to create a statute of repose for the benefit of builders cannot be considered to be in the best interests of the greater part of the disabled community.

### B. Treating § 3613(a)(1)(A) As A Statute Of Repose Is Contrary To Cannons Of Statutory Construction.

#### 1. The Ninth Circuit's construction of the FHA is inconsistent with common law principles related to tort actions.

"This Court has noted that an action brought for compensation by a victim of housing discrimination is, in effect, a tort action." *Meyer v. Holley*, 537 U.S. at 285 (citing *Curtis v. Loether*, 415 U.S. at 195-196). The Ninth Circuit, ignoring this Court's reversal of the Ninth Circuit in *Meyer v. Holley*,[4] held that this Court's holding in *Curtis v. Loether* was limited to the narrow issue of the availability of jury trials. The Ninth Circuit, however, did not cite to any decision of this Court (or of any other Court of Appeals) to support its excepting FHA claims from treatment as tort actions.

The classification of FHA claims as tort actions is helpful for statutory interpretation as "[t]he common law, having been classified and arranged into a logical system of doctrine, principles, rules, and practices, furnishes one of the most reliable backgrounds upon which analysis of the objects and purposes of a statute can be determined." 2B NORMAN J. SINGER, STATUTES AND

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4. In *Holley v. Crank*, 258 F.3d 1127, 1129 (9th Cir. 2001), the Ninth Circuit held that "[a]lthough under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act is different . . ." *Id.* at 1129. Such exception to general principles of tort law was rejected by this Court in *Meyer v. Holley*, 537 U.S. 280 (2003).

STATUTORY CONSTRUCTION § 50.01, p. 139 (6th ed. 2000). See also, *Meyer v. Holley*, 537 U.S. at 285 citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law . . . principles"); and *United States* v. *Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law").

A simple analog to FHA liability under § 3604(f)(2) based upon a failure to properly design and construct covered multi-family housing was presented by Judge Fisher in his thoughtful dissent to the Ninth Circuit's decision:

> Before[a person is injured], the improperly designed building (and the landlord's unimplemented rental policy) are much like a potentially dangerous ditch into which no one has yet fallen — *capable* of inflicting harm and violating the law, but not yet actually doing either.

*Garcia*, 526 F.3d at 471 (Fisher, J., dissenting (emphasis in original)).

### 2. The Ninth Circuit fails to show that Congress intended to create a statute of repose.

"[T]he standard rule [is] that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry*, 522 U.S. at 200-201 (1997) quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); and citing *Clark v. Iowa City*, 20 Wall. 583, 589 (1875) ("All statutes of limitation begin to run when the right of action is complete . . . ."). This Court has noted that:

> While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.

*Reiter v. Cooper*, 507 U.S. 258, 267 (1993).

Unless Congress directs otherwise in the legislation at issue, "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry, supra*, at 200-201.

As § 3613(a)(1)(A) has been construed by the Ninth Circuit, an even more odd result obtains because the statute of repose does not give potential defendants repose against claims for injunctive relief filed by the Attorney General, a fact noted by the Ninth Circuit. *See, Garcia*, 526 F.3d at 461 (fn. 2).

### 3. The Ninth Circuit's construction is inconsistent with the FHA's remedial intent.

This Court has been "mindful of the [Fair Housing] Act's stated policy 'to provide, within constitutional limitations, for fair housing throughout the United States.' " *City of Edmonds*, 514 U.S. at 731 (quoting § 3601). The FHA is broadly interpreted so as to fully effectuate Congress' remedial purpose. *See, e.g.*, *Havens*, 455 U.S. at 372-74; *Trafficante*, 409 U.S. at 209-12 (holding that the language of the FHA is "broad and inclusive," that the FHA carries out a "policy that Congress considered to be of the highest priority," and that vitality can be given to this policy "only by a generous construction" of the statute). Such generous construction encompasses FHA provisions that concern "complaint-filing." *City of Edmonds*, 514 U.S. at 731.

## C. Even If § 3604(f)(3)(C) Independently Sets Forth An Actionable "Discriminatory Housing Practice," The Continuing Violations Doctrine Is Applicable.

### 1. The Ninth Circuit's decision is contrary to HUD's nationally applicable guidance.

HUD has published a manual taking the position that suits can be filed "at any time that the building continues to be in noncompliance, because the discriminatory housing practice – failure to design and construct the building in compliance – does not terminate." U.S. Dep't of Hous. & Urban Dev., *Fair*

*Housing Act Design Manual: A Manual To Assist Designers and Builders in Meeting the Accessibility Requirements of the Fair Housing Act* 22 (rev. 1998)) http://ww.huduser.org/publications/destech/fairhousing.html (Last visited Jul. 29, 2008). The Ninth Circuit understands that it's decision is contrary to such guidance. *See, Garcia*, 526 F.3d at 462.

### 2. HUD's position is persuasive and is consistent with the statute.

While HUD's manual is entitled only to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), HUD's interpretation is persuasive and dovetails with both the statutory text and nontextual considerations. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979) ("[HUD's] interpretation of the [FHA] ordinarily commands considerable deference."); *Trafficante*, 409 U.S. at 210 ("[T]he consistent administrative construction of the [Fair Housing] Act . . . is entitled to great weight.").

HUD's view that the continuing violations doctrine is applicable to causes of action predicated upon § 3604(f)(3)(C) is based upon the fact that the failure to properly design and construct "does not terminate." The Ninth Circuit held, however, that "'a failure to design and construct,' . . . is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at conclusion of the design-and-construction phase." *Garcia*, 526 F.3d at 462. Such holding is presented by the Ninth Circuit without any citation to authority, but necessarily assumes that "a failure to design and construct" can only be an act of commission

and not an act of omission. Such assumption is contrary to both the customary breadth accorded to "acts" proscribed by statutes[5] as well as Congress' choice to use of the word "failure" in § 3604(f)(3)(C). A "failure" is inherently an act of *omission*.[6] Similarly, an "act of omission" is defined as "the failure to do something that is legally required; a nonoccurrence that involves the breach of a legal duty to take positive action." BLACK'S LAW DICTIONARY 26 (8th ed. 2004).

When the "failure" described in § 3604(f)(3)(C) is properly considered to constitute an act of omission, effect can be given to the word "termination" as used in § 3613(a)(1)(A). The Ninth Circuit's holding renders superfluous the word "termination," but the legislative history shows that the word "termination" was purposely included in the amendment to the FHA's statute of limitations to "reaffirm the concept of continuing violations, under which the statute of limitations is measured from the date of the last asserted occurrence of the unlawful practice." H.R.Rep. 100-711, p.33, 100th Cong., 2nd Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2194 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982)).

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5. "[I]n a legislative enactment, . . . if the phrase act or omission is found, the first word is being employed in the limited sense of act of commission; whereas if only the word 'act' is used, it is construed ordinarily to include also forbearance or omission." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW § 4, at 658 (3d ed. 1982) (footnotes omitted).

6. A "failure" is an "omission of occurrence or performance; *specif*: a failing to perform a duty or expected action." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 445 (1985).

Finally, the Ninth Circuit's rejection of HUD's guidance is contrary to Congress' plain statement that "[t]o the extent that terms, conditions, privileges, services or facilities operate to discriminate against a person because of a handicap, *elimination* of the discrimination would be required in order to comply with the requirements of this subsection." H.R.Rep. 100-711, p.23-24, 100th Cong., 2nd Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2184-85 (emphasis added).

## III. THE QUESTIONS PRESENTED ARE IMPORTANT.

Addressing the enforcement of the Fair Housing Act, this Court has noted that "the enormity of the task makes the role of the Attorney General minimal, [so] the main generating force must be private suits." *Trafficante*, 409 U.S. at 209, 211. The Ninth Circuit's limitation on private suits undermines the FHA's most important enforcement mechanism – private suits.

The Amicus briefs filed in the Ninth Circuit highlight the importance of the questions presented:

> The legal issue presented in this appeal is of great importance to these amici, their members and constituents. The design and construction provisions of the Fair Housing Amendments Act of 1988 were intended to benefit the estimated 49.7 million people in the United States who have some type of disability. As the nation's population of older persons rises dramatically over the next several decades, and as a larger number of

> veterans return from service to their country with serious disabilities, the need for accessible housing will grow at a much faster rate than the United States has ever experienced. Unless people with disabilities have the legal right to enforce the design and construction standards of the Fair Housing Act when they encounter inaccessible housing, Congress' intent to eliminate the long-standing segregation of people with disabilities will be frustrated.

*Brief of Amici Curiae AARP; National Fair Housing Alliance, Inc.; Paralyzed Veterans of America; National Spinal Cord Injury Association, Inc.; The Epilepsy Foundation; International Association of Official Human Rights Agencies (IAOHRA); The ARC of the United States in Support of Appellants and Urging Reversal*, p. 4.

Similarly, another Amicus brief noted that:

> [E]ffective enforcement of the Fair Housing Act is needed to realize the Fair Housing Act's objectives of integrating persons with disabilities into the American mainstream and making it possible for persons with disabilities to live dignified and independent lives. Amici believe that enforcement actions filed by private individuals who are the victims of discrimination are the key to effective enforcement of the Act's accessible housing requirements.

*Brief of Amici Curiae Silver State Fair Housing Council, Inc., Nevada Disability Advocacy and law*

*Center, Disability Rights Education and Defense Fund, Inc., Disability Rights Advocates, National Disability Rights Network, The Impact Fund, Protection and Advocacy, Inc., and Law Professors Robert G. Schwemm, Michael P. Seng, and Michael Evans in Support of Appellants Noll Garcia, Tamara Thompson, and Disabled Rights Action Committee*, p. 2.

## CONCLUSION

If Congress had wanted to create (as part of an amendment to the FHA intended to extended fair housing protections to the disabled) a *two year* statute of repose for the benefit of the housing industry where such statute of repose does not even provide "repose" in that suits can still be brought by the Attorney General, then Congress could have done so. Instead, the Ninth Circuit Court of Appeals has taken upon itself the crafting of such an odd result.

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 13, 2008

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-35647, No. 06-15042

NOLL GARCIA,

Plaintiff-Appellant,

STATE FARM FIRE AND CASUALTY COMPANY,

Intervenor-Appellee,

v.

DENNIS BROCKWAY; ROBERT STEWART; STEWART MILES & ASSOCIATES,

Defendants-Appellees,

and

J. J. ZAVOSHY; Y. W. ZAVOSHY; H&H PROPERTIES; ZAVOSHY REV. INTER VIVOS TRUST,

Defendants.

*Appendix A*

TAMARA THOMPSON; DISABLED RIGHTS ACTION COMMITTEE,
(a Utah non-profit corporation),

Plaintiffs-Appellants,

v.

GOHRES CONSTRUCTION CO.,
a Nevada corporation; MARC GOHRES,

Defendants,

and

MICHAEL E. TURK,

Defendant-Appellee.

Appeal from the United States District Court for the District of Idaho. D.C. No. CV-03-00193-MHW, D.C. No. CV-05-00156-ECR. Mikel H. Williams, Magistrate Judge, Presiding.

Argued and Submitted

March 25, 2008 — San Francisco, California

Filed May 13, 2008

*Appendix A*

Before: Alex Kozinski, Chief Judge, Harry Pregerson, Stephen Reinhardt, Andrew J. Kleinfeld, Barry G. Silverman, M. Margaret McKeown, Kim McLane Wardlaw, Johnnie B. Rawlinson, Richard R. Clifton, Carlos T. Bea and N. Randy Smith, Circuit Judges.

Opinion by Chief Judge Kozinski;

Dissent by Judge Pregerson;

Dissent by Judge Fisher

## OPINION

KOZINSKI, Chief Judge:

We consider when the statute of limitations begins to run in a design-and-construction claim under the Fair Housing Act (FHA).

### Facts

In these consolidated cases, plaintiffs appeal the district court's determination that their FHA design-and-construction claim was time-barred by the two-year statute of limitations. The fact patterns in these cases (at summary judgment) differ in several significant respects:

*Garcia v. Brockway*, No. 05-35647: In 1993, Dennis Brockway built the South Pond Apartments in Boise, Idaho, and sold the last unit in 1994. In 1998, the Idaho

*Appendix A*

Fair Housing Council filed an administrative complaint with the U.S. Department of Housing and Urban Development (HUD), and in 2001 Brockway entered into a conciliation agreement with HUD and the Idaho Fair Housing Council that resolved the complaint and provided a fund to pay for accessibility modifications to any unit for any resident with a disability.

In 2001, plaintiff Noll Garcia rented a unit at South Pond and resided there until 2003. Because of a disability Garcia uses a wheelchair for mobility. While at South Pond, his apartment did not comply with the design-and-construction requirements of the FHA. It lacked curb cuts from the parking lot to the sidewalk, it didn't have a ramp to the front entrance door and the doorways were too narrow to allow clear passage of a wheelchair. Garcia's requests that management make accessibility improvements were ignored, as was his request that management build a ramp to his door or that he be relocated to a more accessible unit. Within two years of leasing the apartment, Garcia sued the original builder and architect (Brockway and Robert Stewart, respectively), and the current owners and management (the Zavoshy defendants). The district court granted summary judgment in favor of Brockway and Stewart because Garcia's design-and-construction claim was not filed within the limitations period. The court denied the Zavoshy defendants' summary judgment on the accommodations and interference claims, and they subsequently settled. Garcia appeals the summary judgment in favor of Brockway and Stewart.

*Appendix A*

*Thompson v. Gohres Construction Co.*, No. 06-15042: In 1997, Gohres Construction built the Villas at Rancho del Norte in North Las Vegas, Nevada. Shortly thereafter, the Villas were issued a final certificate of occupancy, and the property was sold through foreclosure in 2001. Defendant Michael Turk is an officer of Rancho del Norte Villas, Inc., and of Gohres Construction. In 1997, the Disabled Rights Action Committee (DRAC) filed a complaint with HUD, and HUD terminated the complaint in 2001 because the complainants, as "testers," lacked standing. We subsequently held that testers have standing to sue under the FHA. *See Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1104 (9th Cir. 2004).

In 2004, plaintiff Tamara Thompson, a member of DRAC, "tested" the Villas and found discriminatory conditions—including an inaccessible building entrance, no curb cuts for the handicapped parking spaces and inadequate access to the pool. Within a year of Thompson's inspection, plaintiffs Thompson and DRAC sued Turk, Marc Gohres and Gohres Construction, asserting an FHA design-and-construction claim. The district court granted defendants' motion to dismiss because the claim was time-barred. We granted plaintiffs' motion to voluntarily dismiss the appeal as to Gohres and Gohres Construction. Plaintiffs thus only appeal the district court's order with respect to Turk.

*Appendix A*

## Analysis

The FHA prohibits the design and construction of multifamily dwellings that do not have certain listed accessibility features. 42 U.S.C. § 3604(f)(3)(C). The statute provides three enforcement mechanisms. First, an administrative complaint may be initiated with HUD, *see id.* §§ 3610-3612, and remedies include actual damages to the aggrieved person, civil penalties and injunctive relief. *See* 24 C.F.R. § 180.670(b)(3). An aggrieved person—i.e., any person who "claims to have been injured by a discriminatory housing practice," 42 U.S.C. § 3602(i)(1)—must file the complaint "not later than one year after an alleged discriminatory housing practice has occurred or terminated." *Id.* § 3610(a)(1)(A)(i). HUD may also file a complaint sua sponte; it's unclear whether HUD is subject to the same limitations period. *See id.*

Second, the Attorney General may bring a civil action if a defendant has "engaged in a pattern or practice of resistance" to FHA rights, or if a "group of persons has been denied any [FHA] rights . . . and such denial raises an issue of general public importance." *Id.* § 3614(a). The FHA does not provide a statute of limitations for these actions, and other courts have held that such actions seeking equitable relief are not subject to any time limit. *See, e.g., United States v. Inc. Vill. of Island Park*, 791 F. Supp. 354, 364-68 (E.D.N.Y. 1992); *United States v. City of Parma*, 494 F. Supp. 1049, 1094 n.63 (N.D. Ohio 1980). Actions seeking damages are subject to the general three-year statute of limitations,

*see* 28 U.S.C. § 2415(b), and those for civil penalties must be "commenced within five years from the date when the claim first accrued." *Id.* § 2462.

The third enforcement mechanism—the one at issue here—is a private civil action. The FHA provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). In other words, an aggrieved person must bring the lawsuit within two years of either "the occurrence . . . of an alleged discriminatory housing practice" or "the termination of an alleged discriminatory housing practice." Here, the practice is the "failure to design and construct" a multifamily dwelling according to FHA standards.[1]

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1. The dissent concedes that our reading of the statute is "not entirely implausible," Dissent at 5341, but insists that the practice at issue is the sale or rental of an FHA-noncompliant unit, rather than design and construction of the building. *Id.* at 5338. Therefore, according to the dissent, the statute of limitations begins to run when a party "first attempts to buy or rent or tests a FHA-noncompliant unit." *Id.* The dissent reaches this conclusion by distinguishing section (f)(3)(C) from sections (f)(1) and (f)(2) on the grounds that (f)(3)(C) is a definitional provision, whereas (f)(1) and (f)(2) provide causes of action. *Id.* at 5338, 5341-42. However, (f)(3)(C) is a coordinate section, not a subordinate section within (f)(1) or (f)(2), so treating (f)(3)(C) as subordinate makes no structural sense.

(Cont'd)

*Id.* § 3604(f)(3)(C). The statute of limitations is thus triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued. In both cases, this triggering event occurred long before plaintiffs brought suit.[2]

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(Cont'd)

Additionally, under the dissent's interpretation, only the party that actually does the selling or renting would be liable, not the party that designed or constructed an FHA-noncompliant unit, because section (f)(1) prohibits only discrimination "in the sale or rental . . . [of] a dwelling," while section (f)(2) prohibits discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling." Thus, if (f)(3)(C) does not operate as an independent prohibition, but merely defines the meaning of "discriminate" under (f)(1) or (f)(2), Garcia wouldn't have a private cause of action under the FHA against Brockway and Stewart (the builders) because they sold or rented no individual units.

The fundamental problem with the dissent's interpretation is that isolating (f)(1) and (f)(2) from (f)(3)(C) alters both the starting point for the statute of limitations and who is liable under the FHA. Were we to adopt the dissent's interpretation, we would make it impossible, or at least more difficult, for the Attorney General to bring a design-and-construction claim against builders under 42 U.S.C. § 3614(a), because design and construction of an FHA-noncompliant building alone would not, under the dissent's interpretation, be actionable under the FHA. The dissent's interpretation therefore may help a few FHA plaintiffs today, but it could harm many more people living in FHA-noncompliant units in the future.

2. This does not leave plaintiffs without any recourse. They can still report the violation to the Attorney General, and—

(Cont'd)

Plaintiffs advance three theories that would extend the limitations period to cover their lawsuits. We address each in turn.

1. Plaintiffs contend that an FHA design-and-construction violation is a continuing one that does not terminate until the building defects are cured. The Supreme Court has held that "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the statutory period, running from] the last asserted occurrence of that practice." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (footnote omitted). Congress has since codified this continuing violation doctrine by amending the FHA to include both "the occurrence [and] *the termination* of an alleged discriminatory housing practice" as events triggering

(Cont'd)
long after construction is complete—he can seek to enforce defendants' legal duty to design and construct if there's "a pattern or practice of resistance," or if "any group of persons has been denied any [FHA] rights . . . and such denial raises an issue of general public importance." 42 U.S.C. § 3614(a). They can also request accommodations, for which they bear the costs, to remedy an impediment. *See id.* § 3604(f)(3)(A)-(B). Garcia's case is a good example. Despite the fact that his claims against Stewart and Brockway were timebarred, Garcia was able to obtain relief by settling with the current owners and management of South Pond with respect to his accommodations claim.

the two-year statute of limitations. 42 U.S.C. § 3613(a)(1)(A) (emphasis added).

Plaintiffs claim Congress's insertion of "termination" would be meaningless if it weren't read as termination of the design-and-construction defect. HUD's *Fair Housing Act Design Manual* supports this reading: "With respect to the design and construction requirements, complaints could be filed at any time that the building continues to be in noncompliance, because the discriminatory housing practice—failure to design and construct the building in compliance—does not terminate." U.S. Dep't of Hous. & Urban Dev., *Fair Housing Act Design Manual: A Manual to Assist Designers and Builders in Meeting the Accessibility Requirements of the Fair Housing Act* 22 (rev. 1998).[3]

Plaintiffs and HUD confuse a continuing violation with the continuing effects of a past violation.

1. "Termination" refers to "the termination of an alleged discriminatory housing practice." The Supreme

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3. Plaintiffs DRAC and Thompson urge us to remand so that the district court can give the HUD Manual proper weight. *See United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (giving deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to interpretations contained in agency manuals or enforcement guidelines). *Mead* does not require us to do so, *see id.* at 238, and we decline their invitation. Instead, we have considered the HUD manual in our analysis and have given it the proper *Skidmore* weight.

Court has "stressed the need to identify with care the specific [discriminatory] practice that is at issue." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2167 (2007). Here, the practice is "a failure to design and construct," which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase. This violation differs from the one Congress codified as "continuing" in light of *Havens*, where the claims were "based not solely on isolated incidents . . . , but a continuing violation manifested in *a number of incidents*—including at least one . . . that [wa]s asserted to have occurred within the [limitations] period." 455 U.S. at 381 (emphasis added).

Put differently, "[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation."[4] *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) (citing *Collins v.*

4. The dissent maintains we're making a "crucial error" by defining the alleged discriminatory housing practice as the failure to design or construct an FHA-compliant unit. Dissent at 5337. The dissent seems to define the act of selling or leasing an FHA-noncompliant unit as the discriminatory housing practice. *Id.* at 5338. However, this confuses the "discrete act of alleged . . . discrimination" with the "date when the effects of this practice were felt." *Ledbetter*, 127 S. Ct. at 2168. The failure to design and construct the unit according to FHA standards is the "underlying" discrete act of discrimination. *Id.* (quoting *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 911 (1989)). And the date of this underlying act "governs the limitations period." *Id.* at 2169 (quoting *Lorance*, 490 U.S. at 911).

*United Airlines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975)); *see also Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 507 (E.D. Va. 2002) ("[An] FHA non-compliant building which contains inaccessible features to disabled persons is more akin to a continuing effect rather than a continuing violation under the FHA."). The Supreme Court last Term reiterated the distinction between a continuing violation and continual effects when it held that "current effects alone cannot breathe life into prior, unchanged discrimination; as we held in *Evans*, such effects in themselves have 'no present legal consequences.'" *Ledbetter*, 127 S. Ct. at 2169 (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). Although the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failing to design and construct is a single instance of unlawful conduct. Here, this occurred long before plaintiffs brought suit.[5] Were

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5. Garcia argues that defendants' involvement with the HUD complaint filed in 1998 continues their prior failure to design and construct. The complaint was resolved in 2001, and Stewart was dismissed from it. Pursuant to a conciliation agreement, Brockway contributed to a modification fund to assist persons with disabilities to modify the properties, including South Pond. We reject the argument that participation in a HUD investigation is an act of discrimination. Further, if such participation were to retrigger the statute of limitations, this would create a large disincentive for builders and architects to cooperate in such proceedings when, as here, HUD initiates them after the two-year limitations period has run for private actions.

(Cont'd)

we to now hold the contrary, the FHA's statute of limitations would provide little finality for developers, who would be required to repurchase and modify (or destroy) buildings containing inaccessible features in order to avoid design-and-construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers. Indeed, now that we have recognized tester standing, an aggrieved person wouldn't even need to solicit tenancy, but merely observe the violation. *See Smith*, 358 F.3d at 1104. This is not what Congress provided in erecting a two-year statute of limitations for FHA design-and-construction claims. If Congress wanted to leave developers on the hook years after they cease having any association with a building, it could have phrased the statute to say so explicitly.

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(Cont'd)

Garcia further contends that Brockway interfered with his FHA rights by not notifying him about the modification fund. But nothing in the conciliation agreement requires Brockway to notify any tenant, and no one disputes that Brockway complied with the agreement. Garcia identifies no action by defendants that would amount to "interference" with FHA rights. *See Walker v. City of Lakewood*, 272 F.3d 1114, 1128-29 (9th Cir. 2001).

Garcia also claims that installation of a ramp to his front door constitutes an act within the limitations period. Brockway hadn't been associated with South Pond for almost eight years when Garcia moved in, and he didn't install the ramp. Nor did Stewart design it. Events that occur after the statute of limitations has run and that do not involve defendants cannot operate to re-start the statute of limitations as to them.

Nor may we ignore the statute of limitations to help an aggrieved person who suffers from the *effects* of such violation decades after construction. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."). As the Supreme Court has held,"[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect [defendants] from the burden of defending claims arising from . . . decisions that are long past." *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980). "A discriminatory act which is not made the basis for a timely charge . . . is merely an unfortunate event in history which has no present legal consequences." *Ledbetter*, 127 S. Ct. at 2168 (quoting *Evans*, 431 U.S. at 558).

2. Plaintiffs also argue that the statute of limitations should not begin to run until the aggrieved person *encounters* the design-and-construction defect.[6] This novel legal theory was first articulated in a law review article. *See* Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. Rich. L. Rev. 753, 849-55 (2006).

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6. Thompson and DRAC raise this claim, but Garcia only argues that his claim would be timely if the continuing violation doctrine, discovery rule or equitable tolling doctrine applied.

There's some support for this "encounter" theory: "A damages action under the [FHA] sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach." *Curtis v. Loether*, 415 U.S. 189, 195 (1974). Because an FHA damages action "sounds basically in tort," plaintiffs claim the statute of limitations is not triggered until a disabled person is actually damaged by the practice. Plaintiffs contend that, upon completion of construction, no injury has yet occurred, and "the standard rule [for tort purposes is] that the limitations period commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (internal quotation marks omitted). Under this theory, the statute of limitations did not begin to run until Thompson tested the Villas, which occurred within two years of filing suit.

Plaintiffs make too much of the Supreme Court's observation that the FHA "sounds basically in tort." The Court was not dealing with the statute of limitations but with the very different question of whether FHA plaintiffs are entitled to a jury trial. This passing reference to tort law cannot be read to trump statutory provisions that deal expressly with the statute of limitations. The FHA's limitations period does not start when a particular disabled person is injured by a housing practice, but by "the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). Under the FHA,

the ability to privately enforce the "new legal duty" thus only lasts for two years from the time of the violation, and the violation here is "a failure to design and construct." *Id.* § 3604(f)(3)(C). Plaintiff's injury only comes into play in determining whether she has standing to bring suit. *See id.* §§ 3602(i)(1), 3604(f)(2). Some aggrieved persons may not encounter this violation until decades after the limitations period has run and thus will be unable to file a civil action, even though they have standing to raise the claim. However, "[i]t goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable." *United States v. Kubrick*, 444 U.S. 111, 125 (1979).

Plaintiffs' theory is further undercut by our decision in *Smith*, in which we held that the harm of the violation occurs when a design-and-construction defect is observed. 358 F.3d at 1104. Under plaintiffs' theory *post-Smith*, any individual with a disability who merely observes the design-and-construction defect could bring suit—even if the limitations period had long run for every tenant and/or owner. The author of plaintiffs' encounter theory concedes that *Smith* creates serious problems for his theory: "[If] testers do have standing based on injury to their § (f)(1)-(2) rights caused by encountering such a building, they could presumably generate an endless series of such injuries by repeated visits to the building. . . . Eventually, the limitations periods would run on the claims based on the earlier

encounters, but the tester could always start a new clock by returning to the building." Schwemm, 40 U. Rich. L. Rev. at 859 (footnote omitted). The encounter theory thus "raise[s] serious equitable issues with respect to timeliness," *id.*, because it strips the statute of limitations of all meaning.

3. Garcia argues that the limitations period does not begin to run until the aggrieved person *discovers* the design-and-construction defect.[7] Garcia advances this theory as both the discovery rule and the equitable tolling doctrine, but neither helps him.

The discovery rule serves to extend the time from which the limitations period starts to run until "the plaintiff knows both the existence and the cause of his injury." *Kubrick*, 444 U.S. at 113. Garcia thus contends that the limitations period shouldn't have started to run until he first visited South Pond in 2001. The discovery rule is strikingly similar to plaintiffs' encounter theory, and thus fails for the same reasons. *See* pp. 5329-31 *supra*. Holding that each individual plaintiff has a claim until two years after he discovers the failure to design and construct would contradict the text of the FHA, as the statute of limitations for private civil actions begins to run when the discriminatory act occurs—not when it's encountered or discovered. See 42 U.S.C. § 3613(a)(1)(A).

"Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information

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7. Plaintiffs Thompson and DRAC do not raise this claim.

bearing on the existence of his claim." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). This doctrine "focuses on a plaintiff's excusable ignorance and lack of prejudice to the defendant." *Leong v. Potter*, 347 F.3d 1117, 1123 (9th Cir. 2003). As Judge Posner has explained, "[e]quitable tolling is frequently confused . . . with the discovery rule. . . . It differs from the [discovery rule] in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990).[8]

Here, Garcia doesn't claim he was injured within the limitations period but was unable to obtain vital information concerning the existence of his claim until the period expired.[9] Instead, he basically contends that

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8. Contrary to the dissent's claim, we're not "holding that Congress intended to bar equitable tolling for *all* FHA claims." Dissent at 5343 n.5. Rather, equitable tolling simply doesn't apply here, as this is not a case where the plaintiff was injured within the limitations period yet unable to determine the source of his injury.

9. Nothing we say precludes the application of equitable tolling if the requirements of the doctrine are met. For example, equitable tolling may be appropriate if the builder prevented testers or problem tenants from visiting the property after the issuance of a certificate of occupancy, or if a medical condition prevented a plaintiff from filing suit for some time after testing

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it would be inequitable not to allow him to bring a civil lawsuit. Fairness, without more, is not sufficient justification to invoke equitable tolling, and the district court properly refused to apply it. In his plea for a fairer outcome, Garcia fails to mention the extreme prejudice defendants would suffer if plaintiffs could indefinitely bring civil damages actions for buildings defendants no longer own and cannot fix without the cooperation of the current owners. This is hardly a situation where there is a "lack of prejudice to the defendant." *Leong*, 347 F.3d at 1123.

In sum, application of the discovery rule or the equitable tolling doctrine, as the district court noted in *Garcia*, "would render the clear language of the statute meaningless and superfluous." Both doctrines would have the same effect as the continuing violation doctrine by tolling the statute of limitations indefinitely and thus stripping it of all meaning. *See* pp. 5326-29 *supra*. Even if we thought this interpretation were more equitable, we don't have the authority to "interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade*, 942 F.2d at 1432.

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the property, *see Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 347 (1997).

*Appendix A*

As both district courts held, an aggrieved person must bring a private civil action under the FHA for a failure to properly design and construct within two years of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued. Because neither plaintiff brought a timely suit, their cases were properly dismissed.

**AFFIRMED.**

**DISSENT BY:** Harry Pregerson; Stephen Reinhardt; Fisher

**DISSENT**

PREGERSON and REINHARDT, Circuit Judges, dissenting:

We adopt in full Judge Fisher's dissent to the three-judge panel's decision, *Garcia v. Brockway*, 503 F.3d 1092, 1101-11 (9th Cir. 2007) (Fisher, Circuit Judge, dissenting), which also appears immediately below, as the dissenting opinion of the en banc minority. We write additionally only to emphasize the extent to which the majority's holding perverts the purpose and intent of the statute. Indeed, the majority's decision well illustrates how statutes of limitations have been twisted by courts to limit the scope and thrust of civil rights laws.

The majority takes an Act that was designed to protect disabled persons by mandating that multifamily housing be made accessible to them and construes its statute of limitations in a way that solely benefits the housing construction industry and renders the statute of far less use to disabled individuals than Congress intended. The Fair Housing Act ("FHA") contains a 30 month grace period that gave developers building new multifamily housing clear notice of what was required to satisfy the statute's accessibility standards. *See* 42 U.S.C. § 3604(f)(3)(C). There is no reason that a developer who fails to comply with these requirements

should not be held accountable for such violations. Nevertheless, the majority holds that unless a disabled person happens to become aware of the developer's failure to comply within two years after the certificate of completion is issued, the developer is home-free—completely immune from suit.[1] Thus, a disabled person who seeks to acquire an FHA non-compliant unit in a housing development more than two years after the development is certified for occupancy cannot sue the developer even if no person familiar with the needs of disabled persons had previously seen the property and no disabled person had been aware of or injured by the violation until the would-be plaintiff attempted to buy or lease the unit. It seems apparent to us that Congress intended the statute of limitations to have the opposite result: that the disabled person who is injured by the developer's violation of the FHA should be able to sue that developer if he institutes his action within two years of the injury. It did not intend to invite the developer to assume the risk of non-compliance, in order to save construction costs, by taking the chance that his violation of the law would remain undiscovered by the disabled community for a period of two years.

The purpose of the FHA's design and construction requirements was to protect an important civil right.

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1. We recognize that "testers" may also bring FHA design-and-construct claims. We do not believe, however, that the efforts of disability rights organizations, however effective they may be, can somehow make up for the fact that the majority's construction essentially precludes causes of action brought by the very persons the statute was intended to protect: disabled individuals.

It was to help provide disabled individuals equal access to multifamily housing and to eliminate the de facto segregation to which handicap-inaccessible housing gives rise. *See* H.R. Rep. No. 100-711, at 27-28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2188-89 ("The Committee believes that these basic features of adaptability are essential for equal access and to avoid future de facto exclusion of persons with handicaps, as well as being easy to incorporate in housing design and construction. Compliance with these minimal standards will eliminate many of the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities."). The Act, including its statute of limitations provision, is to be construed in a manner that accomplishes this purpose. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972) (mandating a "generous construction" of the FHA's complaint-filing provisions to "give vitality to" the statute's "broad and inclusive" language); *McGary v. City of Portland*, 386 F.3d 1259, 1262 (9th Cir. 2004). This the majority has not done. Instead, it construes the FHA's statute of limitations so as to offer the least benefit to disabled persons and the most to developers of multifamily housing. Because we cannot condone a construction so wholly at odds with the purpose of the statute, and the manner in which we are to construe it, we respectfully dissent.

*Appendix A*

FISHER, Circuit Judge, dissenting:

I respectfully dissent. The majority erroneously treats a building's improper design and construction as the event that triggers the Fair Housing Act's (FHA) two-year statute of limitations. It does so by finding an ambiguity in the statute and then resolving that ambiguity contrary to the overall purpose and structure of the FHA and its legislative and judicial history.

I believe instead that the most plausible reading of the statute is that the limitations period begins (at the earliest) when a disabled person actually experiences discrimination — either in attempting to buy or rent a noncompliant housing unit, in "testing" such a unit or upon moving in as a tenant. The majority contravenes the general rule that statutes of limitations are triggered by the accrual of a plaintiff's cause of action. Under the majority's approach, a real estate developer or landlord of a noncompliant building will often be immunized from suit long before a particular disabled individual has been injured and able to challenge the noncompliant features. Importantly, the majority's position is at odds with the FHA's legislative history, with Supreme Court precedent regarding the statute's construction and with the longstanding interpretation of the government agency charged with administering the FHA.

As a result of the majority's reading, disabled persons — the statute's actual intended beneficiaries — will be stripped of their ability to enforce the FHA's most important protection and instead will be relegated

to "reasonable modifications" at their own expense. In contrast, real estate developers and landlords who ignore the FHA's design requirements will receive a free pass once two years have elapsed since a defective building's construction. Ironically, by invoking provisions Congress inserted into the FHA to expand disabled persons' access to the courts and to facilitate private enforcement, the majority transforms a statute of limitations into a highly unusual statute of repose for the benefit of real estate developers and landlords.

I would hold that Appellants' claims are not time-barred. Noll Garcia filed suit within two years of moving into the South Pond Apartments, and Tamara Thompson sued less than a year after finding discriminatory conditions at the Villas at Rancho del Norte. Accordingly, I would reverse the district courts' rulings and remand so that Appellants may proceed with their cases.

## I.

The majority begins its analysis of private civil actions under the FHA by correctly quoting the applicable statute of limitations. *See* 42 U.S.C. § 3613(a)(1)(A) ("An aggrieved person may commence a civil action . . . not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . whichever occurs last. . . ."). But the majority then commits a crucial error that underlies the rest of its decision. "Here," the majority states, "the [discriminatory housing] practice is the 'failure to design

and construct' a multifamily dwelling according to FHA standards." Majority Op. at 5324; *see also id.* at 5327 ("Here, the practice is 'a failure to design and construct,' . . . ."); *id.* at 5330 ("[T]he violation here is 'a failure to design and construct.'"). Having conceived of Appellants' claims as being limited to the design and construction of the South Pond Apartments and the Villas at Rancho del Norte, the majority leaps to the conclusion that those claims are time-barred. "In both cases, th[e] triggering event," i.e., "the conclusion of the design-and-construction phase," "occurred long before plaintiffs brought suit." *Id.* at 5325-26.

The problem with the majority's analysis is that a "failure to design and construct" is not *itself* an event that can trigger the FHA's statute of limitations. Under § 3613(a)(1)(A), an "*aggrieved* person" must file suit within two years of "the occurrence or the termination of an alleged *discriminatory housing practice*" (emphases added). Section 3602(f) defines a discriminatory housing practice, in relevant part, as "an act that is *unlawful* under section 3604 . . . of this title" (emphasis added). Section 3604, in turn, states that "it shall be unlawful," among other things, "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap," § 3604(f)(1), and "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection such dwelling, because of a handicap," § 3604(f)(2). Section 3604 *separately* states that "[f]or purposes of this subsection,

discrimination includes — . . . a failure to design and construct [covered multifamily] dwellings" in accordance with various requirements concerning accessibility to and use by disabled persons. § 3604(f)(3)(C).

The most natural reading of these provisions is that the FHA's statute of limitations is triggered when someone is aggrieved by one of the unlawful actions specified by § 3604(f)(1) or § 3604(f)(2), with the two-year period running from the occurrence or termination of the offending practice. The limitations period for a disabled would-be buyer or renter or tester thus begins (at the earliest) when that individual first attempts to buy or rent or tests a FHA-noncompliant unit.[2]

At that point — but not previously — it can be said that a real estate developer or landlord has "discriminate[d] in the sale or rental, or [has] otherwise ma[d]e unavailable or den[ied] a dwelling to [the individual] because of a handicap," § 3604(f)(1), or has "discriminate[d] against [the individual] in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of a handicap," § 3604(f)(2). Until then, the disabled person has not been subjected to any discriminatory action. Analogously, the limitations period for an actual tenant begins (at the earliest) when the individual first moves into a FHA-noncompliant unit.

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2. Under *Smith v. Pac. Prop. & Dev. Corp.*, 358 F.3d 1097, 1102 (9th Cir. 2004), a "tester," i.e. "someone having no interest in actually buying or renting that poses as buyer or renter to collect evidence of unlawful housing practices," has standing to sue under the FHA.

Only at that point is it fair to say that a real estate developer or landlord has "discriminate[d] against [the individual] . . . in the provision of services or facilities . . . because of a handicap." § 3604(f)(2).[3] Because real

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3. I suggest that the limitations period begins *at the earliest* when a plaintiff is first injured because there is a colorable argument that the statute of limitations is not actually triggered until a covered dwelling's statutory violations have been *cured*. When Congress amended the FHA in 1988, it rewrote § 3613(a)(1)(A) so that the limitations period begins "after the occurrence *or the termination* of an alleged discriminatory housing practice" (emphasis added). *See also* House Report at 33, 1988 U.S.C.C.A.N. at 2194 ("[T]he statute of limitations is measured from the date of the *last asserted occurrence* of the unlawful practice.") (emphasis added). This language suggests that once a plaintiff has been injured by a discriminatory housing practice (and thus is "aggrieved"), he may file suit up until two years have passed since that practice was terminated. If the practice is never terminated, because the dwelling is never brought into compliance with the FHA, then the limitations period presumably never begins to run (though the plaintiff's suit may be barred by laches or other equitable doctrines).

The Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), lends support to this reading. Considering an alleged "continuing pattern, practice, and policy of unlawful racial steering," the Court held that suits under the FHA were timely as long as they were filed within 180 days (the pre-1988 limitations period) of the last application of that policy. *Id.* at 381; *see also id.* (finding claims timely because they "are based not solely on isolated incidents . . . but a continuing violation manifested in

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estate developers, like landlords, engage in the "provision of services or facilities" and "make unavailable or deny[ ] a dwelling" to a handicapped individual, they can be liable under (f)(2) and (f)(1).[4]

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a number of incidents — including at least one . . . that is asserted to have occurred within the 180-day window"). The limitations period in *Havens* thus did not begin when the plaintiffs were first injured, but rather when the continuing statutory violation of which they were complaining finally terminated. In *Montana Fair Housing, Inc. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999), similarly, the district court cited *Havens* and concluded that "[t]he pivotal date is . . . the date of the last alleged [statutory] violation." The limitations period for a disabled tenant therefore "did not begin to run on the date [she] moved in . . . but, at the earliest . . . when a ramp was finally installed outside her apartment." *Id. But see Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 F. App'x 469, 480 (6th Cir. 2006) (unpublished) (rejecting proposition that FHA's limitations period "is tolled until the noncompliant conditions are remedied").

We need not decide here whether the limitations period for FHA claims begins when a plaintiff is first injured or when the alleged discriminatory housing practice terminates. Garcia and Thompson's suits were clearly timely even under a first-injury rule.

4. Even if the majority were correct that § (f)(3) provides a cause of action separate from subsections (f)(1) and (f)(2), it is undeniable that plaintiffs do not *have* to bring suit under (f)(3) if they wish to bring a claim against real estate developers. Here, for example, both Thompson and Garcia cited
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This reading is consistent with the understanding of other courts, commentators and, as discussed below, the Department of Housing and Urban Development (HUD), the agency charged with enforcing the FHA. *See, e.g., Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 F. App'x 469, 481 (6th Cir. 2006) (unpublished) (FHA limitations period "begin[s] to run from the date that the individual attempted to buy the unit and discovered the nonconforming conditions"); *id.* at 480 (referring to the "overwhelming majority of . . . federal courts that have . . . rejected the position advanced" here by the majority); *Montana Fair Housing, Inc. v. Am. Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1063 (D. Mont. 1999); Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. Rich L. Rev. 753, 851 (2006) ("If a disabled homeseeker's § (f)(1)-(2) rights are not violated until his first encounter with the defendant's building, then a complaint filed promptly thereafter is timely, regardless of how old the building is."). The majority, however, goes down a different path, contending that it is the actions described by *§ 3604(f)(3)(C)* — namely

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§ 3604(f)(3)(C) in their complaints, but Thompson's complaint further alleged violations of § 3604(f)(2) and Garcia's complaint further alleged violations of both § 3604(f)(1) and § 3604(f)(2), both of which can be applied to developers as well as landlords. For the same reason, the majority's concern that the Attorney General would be hampered in bringing design-and-construction claims under my interpretation of the statute is baseless. *See* Majority Op. at 5324-25, n.1.

the faulty design and construction of a covered dwelling — that trigger the FHA's statute of limitations. The majority's construction, while not entirely implausible, ultimately fails for the simple reason that § 3604(f)(3)(C) is crucially different from § 3604(f)(1) and § 3604(f)(2).

The activities specified by § 3604(f)(1) and § 3604(f)(2) — all of which involve taking action against a disabled person "because of" that person's "handicap" — are clearly "unlawful" "discriminatory housing practices" that begin the FHA's limitations period. In contrast, § 3604(f)(3)(C) is best read as a specific *example* of the discrimination that in fact becomes actionable under § 3604(f)(1) and § 3604(f)(2) — *when* that discrimination takes place "in the sale or rental . . . to any buyer or renter," § 3604(f)(1), or "against any person in the terms, conditions, or privileges of sale or rental . . . or in the provision of services or facilities," § 3604(f)(2). Section § 3604(f)(3)(C) is a *definitional* provision, stating that "discrimination includes . . . the [faulty] design and construction of covered multifamily dwellings," rather than a provision that actually sets forth a cause of action.[5] The construction of a FHA-

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5. The majority reads far too much into § 3604(f)(3)(C)'s placement as coordinate with subsections (f)(1) and (f)(2). *See* Majority Op. at 5324-25, n.1. Section (f)(3) is framed very differently from (f)(1) and (f)(2), indicating that it is a definitional provision, not a coordinate one. Section 3604 states that it is "unlawful" to do the actions described in (f)(1) and (f)(2), but does not state that the actions in (f)(3) are similarly unlawful. The legislative history confirms this interpretation. (Cont'd)

noncompliant building thus no more triggers the FHA's statute of limitations than the creation of any other latent discriminatory condition or policy (e.g., a landlord's policy — as yet unenforced — not to rent to disabled people). It is only when that latent condition or policy results in an action prohibited by § 3604(f)(1) or § 3604(f)(2) that the limitations period begins. Beforehand, the improperly designed building (and the landlord's unimplemented rental policy) are much like a potentially dangerous ditch into which no one has yet fallen — *capable* of inflicting harm and violating the law, but not yet actually doing either. *See Village of Olde St. Andrews, Inc.*, 210 F. App'x at 480 ("[F]rom a purely textual standpoint a violation of the relevant Fair Housing Act provision here requires more than the mere design and construction of a noncompliant housing unit. Recall, the text of the Fair Housing Act itself focuses on housing discrimination *in the sale or rental* of housing units.") (emphasis in original).

Applying this analysis to the cases at hand, Appellants' suits were plainly timely. While both the South Pond Apartments and the Villas at Rancho del Norte were built more than two years before Garcia and Thompson sued, this fact is irrelevant since their rights under § 3604(f)(1) and § 3604(f)(2) were not violated until

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*See* H.R. Rep. No. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185 ("House Report") (referring to "the general prohibitions under (f)(1) and (2)" and characterizing "[n]ew subsection [3604](f)(3)" as merely "augment[ing]" them).

they came into contact with the defective buildings. Garcia's limitations period thus began no earlier than when he moved into South Pond (less than two years before he filed suit), and Thompson's limitations period began no earlier than when she tested the Villas (less than one year before she brought her claims). It is on *those* dates — not when South Pond and the Villas were constructed — that Garcia and Thompson were the victims of discriminatory housing practices that triggered the FHA's statute of limitations.

My conclusion that Appellants' suits are not time-barred is thus based directly on the statutory text, and does not depend on the statute's codification of the continuing violations doctrine. Nevertheless, it is worth noting that the majority's analysis of that doctrine, *see* Majority Op. at 5326-29, suffers from the same defect as its analysis of the rest of the statutory text. Appellants "confuse a continuing violation with the continuing effects of a past violation," *id.* at 5327, only if the relevant violation is defined (incorrectly) as a failure to design and construct FHA-compliant dwellings. If the violation is properly characterized as a practice of carrying out the actions prohibited by § 3604(f)(1) and § 3604(f)(2), then it is plain that Appellees' unlawful conduct itself — as opposed to merely its consequences — continues until that practice is halted. *See* Schwemm, *supra*, at 848 ("[A] nonconforming building amounts to an ongoing discriminatory denial of 'privileges' or 'facilities' to disabled tenants and homeseekers regardless of how many years have passed since the building was

completed."); *cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (holding that FHA suit is timely if allegedly unlawful policy continues into the limitations period).[6]

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6. Even if my reading of the statutory text is incorrect and the majority is right that the FHA's statute of limitations begins to run "at the conclusion of the design-and-construction phase," Majority Op. at 5324, the majority's reasons for rejecting the *equitable tolling doctrine* are unpersuasive. The starting presumption, read into every federal statute of limitations is that filing deadlines are subject to equitable tolling unless there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1188 (9th Cir. 2001) (en banc) (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997)). The statutory considerations that preclude the application of the equitable tolling doctrine are absent in this case.

First, § 3613 sets forth its time limitation in "fairly simple" form, neither "unusually emphatic" nor "highly detailed" and "technical." *Brockamp*, 519 U.S. at 350. Second, tolling the FHA's statute of limitations would not produce the kind of administrative nightmare that suggests "Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires." *Id.* at 353. Indeed, the Department of Housing and Urban Development (HUD) — the administrative agency charged with administering the FHA — has weighed in against the majority's interpretation of § 3613. Finally, the FHA does not already provide for generous tolling or other broad exceptions. *See United States v. Beggerly*, 524 U.S. 38, 48-49 (1998).

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## II.

The majority's interpretation not only disconnects "design and construction" from § 3604(f)(1) and § 3604(f)(2), but it is also flawed because it triggers the limitations period before a particular plaintiff has been "aggrieved"—i.e., injured. *See* Majority Op. at 5329 ("The FHA's limitations period does not start when a particular disabled person is injured by a housing practice . . . ."); *id.* at 5330 ("Some aggrieved persons . . . will be unable to [ever] file a civil action . . . ."). This reading conflicts with the statutory text as well as the presumption that statutes of limitations are not triggered at least until the plaintiff's cause of action has accrued. In effect, the majority converts what is plainly a statute of *limitations* into a statute of *repose*.

Subsection 3613(a)(1)(A) states that only "[a]n *aggrieved* person" may file suit under the FHA (emphasis added). Under § 3602(i), " '[a]ggrieved person' includes any person who — (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." Accordingly, until a plaintiff has become "aggrieved,"

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Whether the doctrine of equitable tolling should be applied in these cases remains an open question that the district courts should address in the first instance on remand. What I cannot accept is the majority's implied holding that Congress intended to bar equitable tolling for *all* FHA claims.

he cannot "commence a civil action"; and until he can legally initiate his action, there is no reason even to consider the further requirement that FHA suits be filed "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." § 3613(a)(1)(A); *see Havens*, 455 U.S. at 381 (linking start of FHA's limitations period to plaintiffs' assertions that they were "deprived . . . of the benefits of interracial association" and suffered "injury to [their] counseling and referral services"); *Village of Olde St. Andrews*, 210 F. App'x at 481.

The majority asserts, however, that the "aggrieved person" terminology pertains only to potential plaintiffs' *standing* to file suit. But this is not how very similar language in other statutes of limitations has been interpreted. Title VII of the Civil Rights Act of 1964, for example, refers to "person[s] aggrieved" and states that the limitations period begins "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). In its recent decision interpreting this provision, the Supreme Court never so much as hinted that Title VII's limitations period would commence before a plaintiff was injured. Indeed, the Court declared that if "an employer forms an illegal discriminatory intent towards an employee but does not act on it until 181 days later," "[t]he charging period would not begin to run until the employment practice was executed on day 181 because until that point the employee had no cause of action. The act and intent had not yet been joined." *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2171 n.3 (2007) (emphasis added); *see also*

*Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 n.7 (2002) (declining to decide "whether [Title VII's limitations period] begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered," but not suggesting that limitations period might commence *before* injury takes place).[7]

The decisions the majority cites also undercut its reading of the "aggrieved person" language. "The issue" in *United States v. Kubrick*, 444 U.S. 111, 113 (1979), was "whether the claim [under the Federal Tort Claims Act] 'accrues' . . . when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice." Both of these possibilities are plainly inconsistent with a theory under which the FTCA's limitations period would begin before a plaintiff has been injured in the first place. Similarly, Judge Posner recognized in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 449 (7th Cir. 1990), that until an "adverse personnel action [has been] taken," a plaintiff's

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7. The majority misreads *Ledbetter* as standing for the proposition that an individual's first experience of discrimination can nonetheless [**47] constitute the mere "effects" of a past discriminatory decision for statute of limitations purposes. *See* Majority Op. at 5328, n.5. As *Ledbetter* makes clear, however, the statute of limitations does not begin to run until the individual *actually experiences* the discrimination herself — i.e., when a discriminatory decision "was made and communicated to [the plaintiff]" — *not* when the defendant adopted a policy that might someday impact a particular plaintiff. *See Ledbetter*, 127 S. Ct. at 2169.

"claim has not accrued and the statute of limitations has not begun to run." In Judge Posner's view, in fact, limitations periods do not begin when plaintiffs are injured but rather when they *discover* that they have been injured. *See id.* at 450 ("Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date — often the same, but sometimes later — on which the plaintiff discovers that he has been injured.").

*Ledbetter*, *Morgan*, *Kubrick* and *Cada* are all illustrations of the general rule that statutes of limitations are not triggered at least until a plaintiff's cause of action has accrued. This general rule — which the majority fails to acknowledge, let alone rebut — has been explicitly articulated by the Supreme Court. "While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an *odd result* in the absence of any such indication in the statute." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993) (emphasis added); *see also Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) ("Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."); *cf. Meyer v. Holley*, 537 U.S. 280, 285 (2003) (FHA claims are analogous to suits in tort, for which limitations period begins at time of injury); *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (same).

Under the majority's reading, the "odd result" discussed in *Reiter* becomes the law of this circuit. The FHA's two-year limitations period begins to run as soon as a covered building's construction has been completed, even though no plaintiff has yet been injured or can yet sue. Such an unusual rule should follow only if it were unambiguously compelled by the statutory text — which it is not.

The majority's error is further exposed by our case law on statutes of limitations in contrast to statutes of repose. "Although the distinction between [the two] is often blurred, statutes of limitations differ from statutes of repose because the former bar[ ] plaintiff[s] from bringing an already accrued claim after a specified period of time, whereas the latter terminate[ ] a right of action after a specific time, even if the injury has not yet occurred." *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 n.7 (9th Cir. 2005) (third alteration in original) (internal quotation marks omitted); *see also Johnson v. Aljian*, 490 F.3d 778, 781 n.12 (9th Cir. 2007) (same); *Underwood Cotton Co. v. Hyundai Merchant Marine (Am.), Inc.*, 288 F.3d 405, 408-09 (9th Cir. 2002) (statute of limitations bars suit because "plaintiff was not diligent enough," while statute of repose "is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace"). The majority's interpretation effectively transforms § 3613 into a statute of repose. A disabled plaintiff's "right of action" is "terminate[d] . . . after a specific time," namely the construction of a covered dwelling, "even if the injury has not yet occurred," *Fields*, 413 F.3d at 952 n.7, and even if the plaintiff has been "diligent enough," *Underwood Cotton*, 288 F.3d at 408.

It is patently clear, however, that § 3613 is actually a statute of limitations. The Supreme Court explicitly labeled it as such in *Havens*, *see* 455 U.S. at 369, 381; the provision is almost identical to 42 U.S.C. § 2000e-5(e)(1), which the Court described as a statute of limitations in *Ledbetter*, *see* 127 S. Ct. at 2166, 2177; Congress repeatedly referred to § 3613 as a statute of limitations in the legislative history, *see* House Report at 16-17, 33, 39, 1988 U.S.C.C.A.N. at 2177-78, 2194, 2200; and even the majority characterizes § 3613 as a statute of limitations and never utters the term "statute of repose."[8] The majority's reading is thus precluded by both our case law and the majority's own terminology. If § 3613 is in fact a statute of limitations rather than a statute of repose, then it cannot be triggered by the construction of an FHA-noncompliant dwelling.

## III.

The majority's position also conflicts with the relevant legislative history, Supreme Court precedent regarding the FHA's construction and HUD's interpretation of the statute it is responsible for administering. The House Report that accompanied the

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8. Moreover, "one typically expects to see a longer period [before suits are barred] in true statutes of repose." *Underwood Cotton*, 288 F.3d at 408; *see, e.g.*, *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1156 (9th Cir. 2000) (referring to the General Aviation Revitalization Act of 1994's 18-year statute of repose). A two-year limitations period is relatively short and thus further confirms that § 3613 is a statute of limitations rather than a statute of repose.

*Appendix A*

Fair Housing Amendments Act of 1988 (in which the current language of § 3613(a)(1)(A) was adopted) stated that private enforcement of the FHA had been "hampered by a short statute of limitations" and that "[e]xisting law has been ineffective because it lacks an effective enforcement mechanism." House Report at 16, 1988 U.S.C.C.A.N. at 2177. Accordingly, "[t]he bill strengthen[ed] the private enforcement section by expanding the statute of limitations" from 180 days to two years. *Id.* at 17, 1988 U.S.C.C.A.N. at 2178. The House Report added that the term "termination" had been added to § 3613(a)(1)(A) in order to "reaffirm the concept of continuing violations, under which the statute of limitations is measured from the date of the last asserted occurrence of the unlawful practice." *Id.* at 33, 1988 U.S.C.C.A.N. at 2194. This language demonstrates that Congress intended to expand access to the courts and facilitate private enforcement when it amended the FHA. This intent, however, cannot be reconciled with the majority's interpretation of the statute, which forever immunizes developers and landlords of FHA-noncompliant buildings from disabled persons' private enforcement actions once two years have passed since the buildings' construction.

In accordance with the statutory text and the legislative history, the Supreme Court has frequently instructed that the FHA should be interpreted flexibly in order to effectuate Congress' ambitious remedial goals in passing the statute. *See, e.g., City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) ("We also note precedent recognizing the FHA's 'broad and

inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision.") (citation omitted); *Havens*, 455 U.S. at 380 (referring to the "broad remedial intent of Congress embodied in the Act"); *id.* (warning against a "wooden application" of the FHA's statute of limitations); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) ("The language of the Act is broad and inclusive."). The majority's position defies these repeated admonitions. Instead of construing the FHA with an eye toward realizing its broad remedial aims, the majority improperly elevates a definitional provision, § 3604(f)(3)(C), above the provisions under which plaintiffs actually bring their claims, and disregards the presumption that statutes of limitations are not triggered at least until the plaintiff has been injured. As a result, Congress' goal of "removing barriers to the use of court enforcement by private litigants" — a goal the Court has explicitly endorsed — is thwarted rather than advanced. House Report at 13, 1988 U.S.C.C.A.N. at 2174.

Lastly, as the majority acknowledges, HUD has issued a manual taking the position that suits can be filed " 'at any time that the building continues to be in noncompliance.'" Majority Op. at 5326 (quoting U.S. Dep't of Hous. & Urban Dev., *Fair Housing Act Design Manual: A Manual To Assist Designers and Builders in Meeting the Accessibility Requirements of the Fair Housing Act* 22 (rev. 1998)); *see also* U.S. Dep't of Hous. & Urban Dev., *Title VIII Complaint Intake*,

*Investigation, and Conciliation Handbook* 3-5 (1995) ("A complainant aggrieved because an otherwise covered multifamily dwelling unit was not designed and constructed [properly] . . . may allege a continuing violation regardless of when construction of the building was completed."). I agree that HUD's manual and handbook are entitled only to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), but I believe, contrary to the majority, that HUD's interpretation is persuasive and dovetails with both the statutory text and nontextual considerations. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979) ("[HUD's] interpretation of the [FHA] ordinarily commands considerable deference."); *Trafficante*, 409 U.S. at 210 ("[T]he consistent administrative construction of the [Fair Housing] Act . . . is entitled to great weight.").

## IV.

The majority argues that my interpretation of the statute — under which the limitations period for private suits brought under the FHA begins no earlier than when a plaintiff is first injured by a discriminatory housing practice — would "eviscerate[ ]" the FHA's statute of limitations and have adverse consequences for real estate developers. Majority Op. at 5328; *see id.* at 5331-32 (discussing the "extreme prejudice defendants would suffer if plaintiffs could indefinitely bring civil damages actions for buildings defendants no longer own and cannot fix without the cooperation of

the current owners").[9] This contention is meritless. First, the FHA's limitations period would not be obviated by my reading of the statute. In fact, plaintiffs would be barred from bringing suit under § 3604(f)(1) and § 3604(f)(2) once two years have elapsed since their injuries, and potential defendants would be immunized from suit two years after remedying the statutory violations of covered dwellings.[10] It is also hard to see how an interpretation that follows the accrual rule presumption can be more radical than one that flouts it.

Second, the legislative history demonstrates that Congress did not share the majority's solicitude for real estate developers. In passing the FHA, and then in amending it in 1988, Congress intended to issue "a clear

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9. The majority expresses no particular concern for landlords, but it is clear that its approach would immunize them from suit as well. While Garcia appeals only the summary judgment in favor of Brockway and Stewart (the original builder and architect of the South Pond Apartments), Thompson appeals only the dismissal of her claims against Turk (the current owner of the Villas at Rancho del Norte). The majority affirms the district court's dismissal of Thompson's claims even though its professed worry about "plaintiffs . . . indefinitely bring[ing] civil damages actions for buildings defendants no longer own and cannot fix without the cooperation of the current owners," Majority Op. at 5332, is plainly groundless as to Turk.

10. Under the alternate theory discussed in footnote 2, *supra*, plaintiffs would be barred from filing suit after dwellings' statutory violations have been cured and two years have elapsed since that curing.

pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." House Report at 18, 1988 U.S.C.C.A.N. at 2179.[11] Congress notably did not express any concern about builders who failed to comply with the relatively modest requirements of § 3604(f)(3)(C) being held to account for their failures more than two years after the offending dwellings were constructed. Indeed, in 1999, Congress rejected a proposed bill that would have barred the FHA's application to housing that was FHA-noncompliant but that had "received a building permit or other similar approval . . . as meeting the requirements of the applicable building code." Justice in Fair Housing Enforcement Act of 1999, H.R. 2437, 106th Cong. § 2(2). Congress was unpersuaded by the bill's proponents that it should "provide relief from prosecution to those in the building community who may have committed building design violations" since the FHA was amended 11 years earlier. *Justice in Fair Housing Enforcement*

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11. Echoing Congress' "clear pronouncement," the Supreme Court has emphasized the rights of the disabled in its FHA decisions. The Court's repeated references to the FHA's "broad and inclusive" language, the "generous construction" that the statute should be accorded and the "broad remedial intent of Congress embodied in the Act" plainly contain no loophole for real estate developers' interests. *Havens*, 455 U.S. at 380; *Trafficante*, 409 U.S. at 209; *see also City of Edmonds*, 514 U.S. at 731-32 (recommending that "an exception to a general statement of policy [in the FHA be] read narrowly in order to preserve the primary operation of the [policy]") (second alteration in original) (internal quotation marks omitted).

*Act of 1999: Hearing on H.R. 2437 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 1999 WL 983520 (statement of Chairman Charles T. Canady). Ironically, the majority now creates for real estate developers the time-bar they were denied by Congress.[12]

Third, to the extent policy considerations are relevant here, they cut against the majority's position. Under its reading of the statute, the intended beneficiaries of the FHA — disabled persons — are barred from enforcing their right to accessible housing (other than through reasonable modifications at their own expense) as soon as two years have elapsed since the completion of a dwelling's construction. A builder could even construct a FHA-noncompliant dwelling and insulate himself altogether from suit simply by waiting two years to look for tenants. *See Village of Olde St. Andrews*, 210 F. App'x at 480 ("Often, housing units go unsold or unlet for some time after they are built. If the statute of limitations were to begin running immediately upon completion of the building, potential buyers may not even look at the property until after the statute of limitations has run. Such a result would run counter to . . . the broad remedial intent of Congress embodied in the Act.") (internal quotation marks omitted). Moreover, the judicial interest in having cases brought while relevant evidence is still available is at a low ebb here.

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12. Notably, no matter how the FHA's statute of limitations for private suits is interpreted, developers may still in some instances be subject to suits brought by the Department of Justice under its "pattern or practice" authority. *See* § 3614(a).

As one district court has observed, "as the FHA requires no showing of intent, defendant's architectural plans and apartment complexes can themselves speak to the alleged construction violations." *Silver State Fair Housing Council, Inc. v. ERGS, Inc.*, 362 F. Supp. 2d 1218, 1222 n.1 (D. Nev. 2005).

Finally, the lot of real estate developers would not be as dire as the majority fears under my reading of the statute. One would hope that relatively few developers are (or have been) building dwellings that do not comply with § 3604(f)(3)(C). Moreover, developers might seek to shift or share their exposure through contractual provisions when they sell dwellings under which the new owners would indemnify the developers against any suits brought under § 3604. Indeed, developers are not the only parties who may be sued under the FHA. For instance, the current owner and landlord of the Villas at Rancho del Norte, Turk, is the sole remaining defendant in Thompson's case; and according to one commentator, "the general view has emerged that a wide range of participants . . . may be named as proper defendants." Schwemm, *supra*, at 778; *see also Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 665 (D. Md. 1998) ("[A]ll participants in *the process as a whole* are bound to follow the FHAA . . . . [A]ny entity who contributes to a violation of the FHAA [is] liable.") (emphasis in original).

## V.

The majority's reading of the FHA's statute of limitations is inconsistent with the statutory text, the presumption in favor of an accrual rule, the relevant legislative history, the generous construction that the FHA must be accorded and HUD's reading of the provision. In accordance with both the statute's language itself and these non-textual considerations, I would hold that the limitations period for claims brought under § 3604(f)(1) and § 3604(f)(2) commences at the earliest when a plaintiff is first injured by a discriminatory housing practice. Applying that approach, I would reverse the district courts' rulings because both Garcia and Thompson were first injured less than two years before they filed suit, and remand for further proceedings. Therefore, I respectfully dissent.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA DATED OCTOBER 12, 2005

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

CV-S-05-0156-ECR (PAL)

TAMARA THOMPSON, and DISABLED RIGHTS ACTION COMMITTEE
(a Utah non-profit corporation),

Plaintiffs,

vs.

RANCHO DEL NORTE VILLAS, INC., A Nevada Corporation; GOHRES CONSTRUCTION CO., a Nevada Corporation; WILLIAM L. GOHRES; MARCH GOHRES; T. ALLEN THOMPSON; MICHAEL E. TURK; DOES I-X; and ROE ENTITIES I-X.

Defendants.

**ORDER**

### I. Procedural Background

On February 3, 2005, Tamara Thompson and Disabled Rights Action Committee ("Thompson", "DRAC" or "Plaintiffs") filed a Complaint (#1) for an injunction and damages for Defendants' violation of the

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Fair Housing Act ("FHA"), 42 U.S.C. §3601 *et seq.* On July 14, 2005, Defendant Marc Gohres and Gohres Construction ("Gohres" or "Defendants") filed a Motion to Dismiss. Plaintiffs responded to the Motion on July 30, 2005 and Defendants filed a reply on August 3, 2005. On August 1, 2005, Defendant Michael E. Turk ("Turk" or "Defendant") filed a Motion to Dismiss or in the alternative, for Summary Judgment. Plaintiffs responded to the Motion on August 18, 2005, and Defendant Turk filed a reply on September 16, 2005. The motions are ripe, and we now rule on them. We treat both motions as motions to dismiss. Since Defendants Turk, Gohres and Gohres Construction Company raise the same arguments in their motions to dismiss, we will consider the motions together in this Order.

For the reasons stated below, Defendants' motions will be granted.

## II. Statement of Facts

In considering the Motions to Dismiss, we take the evidence as presented in the complaint in the light most favorable to the Plaintiff.

Rancho del Norte Villas ("Rancho") is a multifamily apartment development comprising of twenty-one buildings and one clubhouse in Las Vegas, Nevada. There are sixteen units in each building creating 336 apartments in total (168 are ground floor units). Rancho was finished in early 1997.

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Defendants Marc Gohres and Gohres Construction Company were the general contractors for Rancho and Michael Turk is the office/director of Rancho and Gohres Construction Company.

Plaintiff, Disabled Rights Action Committee, is a Utah non-profit corporation organized with the principal purpose of helping to eliminate discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing, public buildings, transportation, goods and services. Plaintiff Tamara Thompson is a Nevada resident who requires a wheelchair for mobility.

In July, 1997, Ronald Ray Smith, a member of the DRAC, visited Rancho and encountered the following discriminatory conditions which he found to be in violation of the FHA, 42 U.S.C. §3604 (f) (7) (A): (1) inaccessible doorways and (2) lack of an accessible ground floor unit (all ground floor units had steps up on the front door). On October 2, 1997, DRAC filed a Housing Discrimination Complaint with the United States Department of Housing and Urban Development ("HUD") (HUD Case Number 09-97-1258-8). On April 30, 2001, HUD dismissed the DRAC's complaint with a "Determination of No Reasonable Cause." HUD found multiple violations of the FHA but still ruled against DRAC on the basis that they did not have "tester" standing. The DRAC thereafter dropped its complaint and did not appeal the decision.

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On January 26, 2004, the Ninth Circuit Court of Appeals filed its decision in *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097 (9th Cir. 2004), which involved DRAC, but a different individual plaintiff and different defendants. In Smith, the Ninth Circuit held that FHA did allow "tester" standing for jurisdiction meaning that DRAC could bring a case on behalf of its members through "tester" suits.

Plaintiffs then decided to re-contest the HUD ruling of 2001 by filing this action in federal court. Tamara Thompson, a new Plaintiff, visited Rancho on October 12, 2004 finding discriminatory conditions in violation of the FHA including: (1) a lack of an accessible building entrance on an accessible route; (2) handicapped parking spaces without curb cuts and with curb cuts blocked by parking spaces; and (3) a lack of access to the pool. Plaintiff also contends that the interior of the apartments at Rancho also may contain discriminatory conditions.

Plaintiffs claim that Thompson has sustained injuries associated with these discriminatory conditions including mental anguish and embarrassment, constraint of housing opportunities, and lack of ability to visit other Las Vegas residents. Plaintiffs claim that Thompson's injuries are "continuing" and will continue until the discriminatory conditions are fixed.

## III. Discussion

Defendant Turk and Defendants Marc Gohres and Gohres Construction request dismissal of Plaintiff's claim on the basis that the Plaintiffs have failed to state a claim upon which relief can be granted.

### A. Standard of Review

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be granted if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996). On a motion to dismiss, "we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife* 504 U.S. 555, 561(1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)) (alteration in original). Moreover, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the non-moving party." *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996) (citation omitted).

Although courts generally assume the facts alleged are true, courts do not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly, "[c]onclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss." *In re Stac Elecs.*, 89 F.3d at 1403 (citation omitted).

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Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is normally limited to the complaint itself. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on materials outside the pleadings in making its ruling, it must treat the motion to dismiss as one for for summary judgment and give the non-moving party an opportunity to respond. Fed R. Civ. P. 12(b); *see United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). "A court may, however, consider certain materials – documents attached to the complaint, or matters of judicial notice – without converting the motion to dismiss into a motion for summary judgment." *Ritchie*, 342 F.3d at 908.

If documents are physically attached to the complaint, then a court may consider them if their "authenticity is not contested" and "the plaintiff's complaint necessarily relies on them." *Lee*, 250 F.3d at 688 (citation, internal quotations and ellipsis omitted). A court may also treat certain documents as incorporated by reference into the plaintiff's complaint if the complaint "refers extensively to the document or the document forms the basis of the plaintiff's claim." *Ritchie*, 342 F.3d at 908. Finally, if adjudicative facts or matters of public record meet the requirements of Fed. R. Evid. 201, a court may judicially notice them in deciding a motion to dismiss. *Id.* at 909: *see* Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

"Dismissal on statute of limitations grounds can be granted pursuant to Fed. R. Civ. P. 12(b)(6) 'only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (quoting *Vaughan v. Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991) (internal citations omitted)).

**B. Statute of Limitations**

Defendant Turk, Gohres and Gohres Construction Company have moved for dismissal of Plaintiff's claims on the ground that the statute of limitations has run and that Plaintiff's claims are therefore untimely. Defendants argue that Plaintiffs had two years from the completion of Rancho to file their claim under the FHA, 42 U.S.C. §3613(a) (1) (A).

Plaintiffs reply by arguing that: (1) the continuing violation doctrine is applicable which creates continuing discrimination due to the existence of defendants' failure to fix the items which were not in compliance with the FHA; (2) the injury alleged in their complaint did not occur until Thompson became aware of the discriminatory conditions in October of 2004; (3) that §3613(a) (1) (A) constitutes a statute of limitations and not a statute of repose; and (4) equitable tolling should apply.

Under §3613(a) (1) (A), "An aggrieved person may commence a civil action in an appropriate United States

district court or State court not later than 2 years after the occurrence or termination of an alleged discriminatory practice . . ." §3613(a) (1) (A). A discriminatory housing practice is "an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. §3602(f). Under §3604(f) (2), which forms the basis of Plaintiff's claim of discriminatory practice, it is illegal to "discriminate against any person in terms, condition, or privileges of sale or rental of a dwelling . . . because of a handicap . . ."

We begin by noting that the issue of construction and design and statute of limitations claims has not been reviewed by the Ninth Circuit. However, this case very closely resembles a case heard by this court just a few months ago as well as other cases not within this jurisdiction. *Silver State Fair Housing Council v. ERGS, Inc., et al.*, 362 F.Supp.2d 1218 (D. Nev. 2005); *Moseke v. Miller & Smith, Inc.*, 202 F.Supp.2d 492 (E.D. Va. 2002); *United States v. Hallmark Homes*, 2003 U.S. Dist LEXIS 20814 (D. Idaho 2003); *United States v. Taigen & Sons, Inc.*, 303 F.Supp.2d 1129 (D. Idaho, 2003); *United States v. Pac. Northwest Elec., Inc.*, 2003 U.S. Dist. LEXIS 7990 (D. Idaho 2003); *Fair Hous. Council, Inc. v. Village of Old St. Andrews, Inc.*, 250 F.Supp.2d 706 (W.D. Ky. 2003). All of these cases have held that the pivotal date for the running of the statute of limitations for purposes of the FHA is the construction of a building which has inaccessibility in violation of the FHA.

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**1. Continuing Violation**

Plaintiffs claims that because the DRAC and Thompson continued to be discriminated against because of the inaccessibility of the building Defendants constructed, that the continuing violation doctrine will apply to the facts of this case.

In *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), the Supreme Court recognized that the continuing violation doctrine applied to the FHA. In *Havens*, the Supreme Court held that an action would not be time-barred where the plaintiffs challenged "an unlawful practice that continues into the limitations period." *Id*, at 381. In that case, the specific conduct that was challenged was repeat acts by the defendant of telling black applicants for housing that there was no availability where the same defendants told white applicants that there was availability. *Id.*, at 369. The Supreme Court held that even though five of the incidents of discrimination took place outside of the limitations time period, evidence of those violations to establish a practice of discrimination would be allowed in under the continuing violations doctrine. *Id.*, at 380. The Court held that because at least one of the incidents occurred within the limitations time period and because the violation was manifested in a policy and practice which had several incidents, the continuing violations doctrine would be applicable and therefore the plaintiffs claims were not barred by the statute of limitations. *Id.*

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*Havens* is distinguishable from the case at hand in that the discriminatory acts challenged in that case constituted a practice that defendants had of discrimination against several people and not of the construction of a building which is in violation of the disability accessibility provisions of the FHA.

However, Plaintiffs seek to provide other bases upon which the continuing violation doctrine may be applied to this case. Plaintiffs first argue that the language of §3613 (a) (1) (A) is significant in that it demonstrates that the violation is continuing until the violations have been terminated by being remedied. As was held by the court in *Moseke*, the plain meaning of the FHA militates against the application of the continuing violation doctrine to the case of the construction of a non-complying building. *Moseke*, 202 F.Supp.2d, at 502-04.

Plaintiffs argue that §3613 runs the statute of limitations at the "termination" or "occurrence" of a discriminatory practice. While Plaintiffs contend that the word "termination" is the key word that should trigger the statute of limitations in this case, we disagree holding that "occurrence" should be the focal word in the case of construction of buildings.

Plaintiffs argue that the word "termination" should be the focus in the case of construction of non-complying buildings because such construction creates a "condition" which manifests an ongoing failure by Defendants to remedy the violation. We reject this reading holding that the creation of the building that is

non-complying is a single act which has ill effects – not multiple acts that constitute several violations. See *Silver State*, 362 F.Supp.2d, at 1222. Therefore, since creation of a non-complying building is a single act, the act has already "occurred" and terminated at the time the building was designed and constructed.

Plaintiffs also attempt to analogize the facts of this case to other cases of continuing violation discrimination in the field of employment. Plaintiffs argue that the doctrine of systematic continuing violation developed by the Ninth Circuit should be applied to this case in finding that a continuing violation existed at the time Plaintiffs filled their case. The Ninth Circuit has yet to apply the continuing violations doctrine to the FHA claims based on the construction of a non-complying building. However, this issue has been tackled by this court as well as other courts beyond this jurisdiction. *Silver State*, at 1221-22.

The Ninth Circuit has developed two types of continuing violations doctrine: serial continuing violations and systematic continuinl violations.[1] *Hart v. Los Angeles County Metro Transp. Auth.*, 1999 U.S. App. 29616, at *4-5 (9th Cir. 1999). Under the

1. Serial continuing violations are made up of a series of related events at least one of which occurs within the limitations time period.. *A.M.R. Enterprises v. City of Phoenix*, 1997 U.S. Dist. LEXIS 3752, at *15 (__, 1997) (citations omitted). Here, Plaintiffs complain of only one "act" and not a pattern of acts making the serial continuing violations doctrine inapplicable to the case at hand.

systematic continuing violation doctrine in cases of employment, a systematic policy of discrimination is actionable even if some or all of the events which evidence the policy occurred before the limitations period. *Williams v. Owens-Illinois, Inc.*, 665 F. 2d 918, 924 (9th Cir. 1982). The systematic continuing violations are claimed usually in failure to promote cases. *See id.* In these cases, employees who fail to be promoted are subjected to the injury every day. They fail to occupy the position to which they have not been promoted because of the employer's discriminatory policy.[2] *Id.*

However, the analogy between systematic continuing violation doctrine and the facts of this case is unavailing. The cases that deal with the systematic continuing violations involve a policy or practice which is applied by the defendant that has the effect of creating a violation on daily basis. The cases applying systematic continuing violations do not involve the continuing effects of the discrete act of discrimination but are instead based on the affirmative creation of

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2. The Ninth Circuit has distinguished between a failure to hire as a result of a policy and a failure to promote because of a policy. Whereas the employee who had failed to be hired because of a policy suffers a discrete injury and can be distanced from the policy and further injury, the employee who fails to be promoted suffers the injury of not being in the promoted position on a daily basis. *Williams v. Owens-Illinois, Inc.*, 665 F. 2d 918, 924 (9th Cir. 1982). The employee who fails to be promoted suffers from a continuing violation whereas the employee who fails to be hired suffers from a continuing effect of the violation. *Id.*

policy of practice that will be applied to the several people over an expansive time period. *Bauer v. Bd. of Supervisors*, 44 Fed. Appx. 194, at *10-11 (9th Cir.2002) (holding that "To assert the continuing violations doctrine, a plaintiff must show that the untimely incidents were: (1) part of an ongoing pattern of discrimination; (2) that defendant continued this pattern into the relevant limitations period"). The facts of this case do not involve a practice or policy like the cases to which Plaintiffs cite. Instead, this FHA claim deals with the one discrete act–the construction of non-complying building–which had the ill effect of making buildings inaccessible to disabled people.[3]

The other courts examining this issue have come to the same conclusion regarding continuing violation. Recently, in Silver State, this court held that while the continuing violation doctrine was applicable to some provisions of the FHA, it was inapplicable to the construction of a non-complying building. In so holding, we reasoned that the injury which plaintiffs claimed they suffered constituted the ill effects of a violation and not a continuing violation itself. *Silver States*, at 1221-22; *Moseke*, 202 F. Supp.2d, at 507.

We hold again that the only acts that should be considered in determining when the statute of limitation in §3613 (a) (1) (A) started to run are the date of design

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3. *See Fair Housing Council, Inc., v. Village of Olde St. Andrews, Inc.*, 250 F.Supp.2d 706. 719 (W.D. Ky. 2003)("the mere existence of a non-compliant building, however, is not an act.").

and completion of construction of the apartments. Here, Plaintiffs have failed to present any evidence of construction or design that took place after early 1997 and therefore, the statute of limitations began to run at that time–giving the Plaintiffs until 1999 to file suit.[4]

**2. Requirement of Injury/Statute of Repose**

Plaintiffs claim that a "discriminatory housing practice" occurs only at the point when a person is injured (meaning they discover the inaccessibility) and not at the construction of design of a non-complying building. They argue several bases for this proposition.

First Plaintiffs argue that since the Ninth Circuit has held that "tester" standing can be established by an injury "'fairly traceable' to [defendant's] actions," that the injury that the Plaintiffs suffer should be start of the time period for the statute of limitations for purposes of §3613 (a) (1) (A). See *Smith*, 358 F. 3d, at 1103-1104.

However, Plaintiffs' argument here is inapposite. The "injury" that Plaintiffs complain of is an ill "effect" of the violation that took place when Rancho was constructed and not a violation of the FHA in and of itself as is discussed above in Section 1.

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4. We note that Plaintiff DRAC did file a complaint with the HUD and that the action then ended in 2001. Plaintiff DRAC would then have had until 2003 to file a claim in district court since their institution of an administrative action would toll the statute of limitations until the completion of the action. 42 U.S.C § 3613 (a) (1) (B).

*Appendix B*

Plaintiffs also argue that the requirement of injury for purposes of the FHA should be analogized to the dangerous condition standard for housing. Art common law, argue Plaintiffs, the statute of limitations does not start to run at the creation of a dangerous condition but only when the injury caused by the dangerous condition actually occurs.[5] At common law, defendants have an ongoing duty to make sure that conditions are safe– Plaintiffs argue that Defendants here have an ongoing duty to construct their housing in compliance with the FHA.

This analogy is incomplete–housing that discriminates and housing or construction that harms physically are two separate claims based on two separate types of laws.[6] We refuse to extend this common law notion into the realm of housing discrimination

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5. *See Russo Farms v. Vineland Bd. Of Educ.*, 144 N.J. 84, 106 (1996) ("Each new injury resulting from a dangerous condition includes every element of a new tort — injury and the current existence of a dangerous condition. Therefore, the statute of limitations for each injury runs from the date of that injury").

6. We note, also, that the timing of the two injuries of dangerous condition and housing discrimination are different. Where, in a tort cause of action, the dangerous condition causes injury to the plaintiff when it physically affects her, while in a housing discrimination case, the plaintiff is injured at the time the non-complying housing is created regardless of when she discovers the inaccessible housing. *See. Moseke*, 202 F.Supp.2d, at 509 (holding that the discovery rule did not apply to toll the statute of limitations for an FHA construction case).

especially in the absence of any evidence of Congressional intent or statutory construction.

Plaintiffs also argue that Congress intended that the FHA provide for private enforcement similar to the creation of a private attorney general to ensure compliance with the statute. They argue that turning the FHA into a "statute of repose" goes against this Congressional intent.

We begin by noting that statutes of limitation grant repose to potential defendants, protecting them from prejudice and uncertainty that can occur when a plaintiff files its claims only after an extended period of time. *Kennecott Utah Copper Corp. v. United States DOI*, 319 U.S. App. D.C. 128, 1212 (D.C. 1996). While it is the job of Congress to strike a balance between "remediation of all injuries and a policy of repose", in this case, the intent of Congress in creating a statute of limitations is clear and expressed within the statute in *§3613. Order of Railroad Telegrapher v. Railway Express Agency*, 321 U.S. 342, 348-50 (1944); *see Albillo-DeLeon v. Gonzales*, 410 F.3d 1090, 1095 (9th Cir. 2005) ("even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free from stale claims in time comes to prevail over the right to prosecute them.") The Supreme Court has held that "it is a cardinal principle of modern law . . . that [statutes of limitation] are to be treated as statutes of repose, and are not to be construed as to defeat their obvious intent to secure the prompt enforcement of claims . . ." *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895).

We cannot agree with Plaintiffs that the statute of limitations provided by Congress in §3613 should be construed against being a statute of repose for Defendants. We note that just because Congress relies heavily on private plaintiffs to enforce the statute and become "private attorneys general" does not militate against the imposition of some point of repose for defendants.

Here, Defendants constructed Rancho almost eight years ago. Since that time, the property has changed hands, been subject to default and undergone other property changes. It would seem unfair to read the express statute of limitations in the FHA in a way that would subject construction companies and original investors to ongoing liability years after the construction of the building.

**3. Equitable Tolling**

Plaintiffs also claim that the doctrine of equitable tolling applies to this case. Plaintiffs argue that because the HUD's ruling barred their claims in 2001, we should now allow them the right to pursue this action against Defendants.

Equitable tolling applies to excuse a Plaintiff's failure to comply with time limitations where she had neither actual nor constructive notice of the filing period. *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997). "Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital

information bearing on the existence of his claim." *Silver State*, 362 F.Supp.2d, at 1221 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). Equitable tolling gives Plaintiffs the ability to gather the information that they need in order to file suit. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). The court has discretion to grant equitable tolling based on whether Plaintiffs acted with due diligence, but such application should be made sparingly. *AMTRAK v. Morgan*, 536 U.S. 101, 113-114 (2002).

Because DRAC filed its claim in 1997, it was aware of the violations at that time. There is no valid claim that equitable tolling applies in this case as Plaintiff DRAC was fully aware of the construction and non-compliance of Rancho.

In regard to Plaintiffs' other claim for applying equitable tolling based on the fact that their action was barred by the rejection of their claims by HUD, it must be noted that Plaintiffs failed to appeal that case. Although they eventually won on the issue of standing in a separate and unrelated case involving different defendants, such a ruling by the Ninth Circuit has no effect on the case at bar. Plaintiffs gave up their rights to litigate at that time when they failed to appeal the case and they are now bound by the decision.

## IV. Conclusion

Defendants' Motions to Dismiss will be granted as to all of Plaintiff's claims.

IT IS HEREBY ORDERED that the Defendants' Motions to Dismiss are GRANTED.

This 12 day of October, 2005.

/s/ Edward C. Reed
UNITED STATES DISTRICT COURT JUDGE

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(2)

No. 08-140

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

TAMARA THOMPSON, *et al.*,

*Petitioners,*

*v.*

MICHAEL E. TURK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## Counter-Statement of the Questions Presented

1) Did the Ninth Circuit properly hold that the statute of limitations on a design-and construction claim under the Fair Housing Act ("FHA") begins to run at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued?

2) Did the Ninth Circuit properly hold that, when a design-and-construction claim is asserted under the FHA, the allegedly discriminatory housing practice is a failure to design and construct, which is not an indefinitely continuing practice, but instead a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase?

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## Statement of the Case

In 1997, defendant Ghores Construction Co. built a multifamily apartment development, the Villas at Rancho del Norte (the "Villas"), in North Las Vegas, Nevada. At the time of construction, defendant Michael E. Turk ("Turk" or "Respondent") was an officer of both Ghores Construction Co. and defendant Rancho del Norte Villas, Inc., the developer. *See Garcia v. Brockway*, 526 F.3d 456, 460 (9th Cir. 2008). On October 15, 1997, the City of North Las Vegas issued the final certificates of occupancy for the Villas. The Villas was later sold, in its entirety, through foreclosure on April 3, 2001. GMAC subsequently sold the property to THG Villas I, LLC, on September 4, 2002.

On July 25, 1997, Ronald Ray Smith ("Smith"), a member of plaintiff Disabled Rights Action Committee ("DRAC" or "Petitioner"), visited the Villas. On October 2, 1997, DRAC and Smith filed a housing discrimination complaint with HUD concerning alleged discriminatory conditions at the Villas. Accordingly, DRAC "tested" the Villas and filed a HUD complaint before the Villas received its final certificates of occupancy on October 15, 1997.

On April 30, 2001, HUD terminated the complaint because the complainants, as "testers," lacked standing. *See id.* The United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") subsequently held that testers have standing to sue under the Fair Housing Act ("FHA"). *See Smith v. Pacific Props. & Dev. Corp.*,

358 F.3d 1097, 1104 (9th Cir.), *cert. denied, Pacific Props. & Dev. Corp. v. Disabled Rights Action Comm.*, 543 U.S. 869 (2004).

On October 12, 2004, plaintiff Tamara Thompson ("Thompson" or "Petitioner"), another member of DRAC, "tested" the Villas and found alleged discriminatory conditions. *See Garcia*, 526 F.3d at 460. On February 4, 2005, plaintiffs Thompson and DRAC (collectively, "Petitioners") sued Turk, Rancho Del Norte Villas, Inc., Ghores Construction Co., William L. Ghores, Marc Gohres, and T. Allen Thompson, asserting an FHA design-and-construction claim. *Id.*

The United States District Court for the District of Nevada, Reed, J. (the "District Court"), granted defendants Marc Ghores and Ghores Construction's motion to dismiss and defendant Turk's separate motion to dismiss because the claim was time-barred. *See id.*

The Ninth Circuit granted the plaintiffs' motion to voluntarily dismiss the appeal as to Marc Ghores and Ghores Construction. Accordingly, the plaintiffs only appealed the District Court's order with respect to Turk. *See id.* This appeal was consolidated with Case No. 05-35647. A three-judge panel of the Ninth Circuit, *Garcia v. Brockway*, 503 F.3d 1092 (9th Cir. 2007) (2-1 decision), affirmed the District Court.

On rehearing en banc, the Ninth Circuit, in a *nine-two* majority decision, adopted the panel opinion and held that "an aggrieved person must bring a private

civil action under the FHA for a failure to properly design and construct within two years of the completion of the construction phase, which concludes on the date that the last certificate of occupancy is issued." *See Garcia v. Brockway*, 526 F.3d 456, 466 (9th Cir. 2008) (en banc) (Kozinski, C.J., writing for the majority). The Ninth Circuit further found that the discriminatory housing "practice is 'a failure to design and construct,' which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase." *Id.* at 462.

## Reasons for Denying the Petition

There is no genuine conflict between the decision below and decisions of this Court and other federal courts of appeal. Further, there is no urgent reason why this Court should grant certiorari; and the Court should wait until there is a well-developed conflict among the circuits. Accordingly, further review is not warranted.

### I. Petitioners have failed to demonstrate a genuine conflict between the *Garcia* opinion and decisions of this Court and eleven other federal courts of appeal.

Petitioners fabricate an alleged conflict by focusing on 42 U.S.C. § 3604(f)(3)(B)[1], the FHA's "reasonable accommodations" provision, rather than on the provision that is *actually at issue*, § 3604(f)(3)(C), which governs

[1] All section references are to Title 42 of the United States Code unless otherwise stated.

"design-and-construction" claims. Petitioners contend that this Court and eleven federal courts of appeal "have construed the definition provided at § 3604(f)(3)(B)) [sic] as subordinate to the discriminatory housing practices described in § 3604(f)(1) and in § 3604(f)(2)." (Pet. at 9.) In other words, these courts have determined that § 3604(f)(3)(B) is not an independently-actionable "discriminatory housing practice"; rather, it merely defines the meaning of "discriminate" under § 3604(f)(1) and § 3604(f)(2). Accordingly, Petitioners maintain that these decisions conflict with *Garcia*, which concluded that § 3604(f)(3)(C) is a coordinate section that provides a cause of action separate from § 3604(f)(1) and § 3604(f)(2).

Petitioners' fabricated conflict is flawed for two reasons: (1) a genuine conflict does not exist because Petitioners' alleged conflicting cases are legally and factually dissimilar from *Garcia*; and (2) Petitioners' cases do not stand for the proposition that § 3604(f)(3)(B) is "subordinate" and merely "definitional," and does not operate as an independent prohibition.

Accordingly, there is no urgent reason why this Court should grant certiorari. Rather, the Court should wait until there is a well-developed conflict among the circuits. At present, the Ninth Circuit is the *only* federal court of appeals to have published a decision that considers when the statute of limitations begins to run in a design-and-construction claim under the FHA. Ten of the thirteen judges who considered this issue agreed that the statute is triggered at the conclusion of the design-and-construction phase. The lopsided nature of

the decision suggests that a genuine conflict among the circuits may never even arise. If it eventually does, however, this Court can always grant certiorari at that time after the issue has received further study by the lower courts.

### A. Petitioners' alleged conflicting cases are legally and factually dissimilar from *Garcia*.

Petitioners have not raised a genuine conflict. None of the cases string cited at pages 9 and 10 of Petitioners' brief concern the same legal issue that was decided below. In *Garcia*, the Ninth Circuit considered "when the statute of limitations begins to run in a design-and-construction claim under the [FHA]." *Garcia*, 526 F.3d at 459. It determined that, for statute of limitations purposes, the discriminatory housing practice at issue was the "failure to design and construct a multifamily dwelling according to FHA standards[,]" as required by § 3604(f)(3)(C). *Id.* at 461. "The statute of limitations [wa]s thus triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued." *Id.* By contrast, Petitioners' cases all address "reasonable accommodations" claims under § 3604(f)(3)(B)[2] rather than design-and-construction claims under § 3604(f)(3)(C); and none of these cases involve an analysis of the statute of limitations contained in § 3613(a)(1)(A).

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[2] Section 3604(f)(3)(B) states that "[f]or purposes of this subsection, discrimination includes— . . . (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . . ."

In addition, the string-cited cases do not involve facts that are even remotely similar to those involved in *Garcia*. Petitioners' cases mainly involve municipal zoning decisions affecting housing for the disabled. *See, e.g.*, *Regional Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35 (2d Cir.) (alleging that a city, its planning board and mayor discriminated by refusing to grant the plaintiff a special-use permit to establish two halfway houses), *cert. denied*, 537 U.S. 813 (2002). *Garcia*, on the other hand, involves alleged violations of design and construction requirements for handicapped access in multi-family dwellings. In light of the legal and factual dissimilarity between *Garcia*, on the one hand, and Petitioners' cases, on the other, Petitioners have failed to identify a genuine conflict within the federal courts of appeal based upon the string-cited cases.

**B. Petitioners' cases do not stand for the proposition that § 3604(f)(3)(B) is "subordinate" to § 3604(f)(1) and § 3604(f)(2).**

Petitioners' cases do not even stand for the proposition that § 3604(f)(3)(B) is "subordinate" to § 3604(f)(1) and § 3604(f)(2), is merely "definitional" and does not operate as an independent prohibition. In *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995), "[t]he sole question before the Court [wa]s whether Edmonds' family composition rule qualifie[d] as a 'restriction regarding the maximum number of occupants permitted to occupy a dwelling' within the meaning of the FHA's absolute exemption." (quoting 42 U.S.C. § 3607(b)(1)). This Court "d[id] not decide whether Edmonds' zoning code provision defining

'family,' as the City would apply it against Oxford House, violate[d] the FHA's *prohibitions against discrimination* set out in 42 U.S.C. §§ 3604(f)(1)(A) and (f)(3)(B)." *Id.* at 732 n.4 (emphasis added). Accordingly, the Court's limited discussion of § 3604(f)(1)(A) and § 3604(f)(3)(B) can only be considered dictum.

This Court's references to § 3604(f)(3)(B), however, do not indicate that it is merely a definitional provision rather than an independently-actionable discriminatory housing practice. Notably, in two instances in the opinion, the Court refers to § 3604(f)(3)(B) as a "prohibition against discrimination." *See Oxford House, Inc.*, 514 U.S. at 732 n.4; *id.* at 738 ("It remains for the lower courts to decide whether Edmonds' actions against Oxford House violate the FHA's *prohibitions against discrimination* set out in §§ 3604(f)(1)(A) and (f)(3)(B).") (emphasis added).

In addition, the federal courts of appeal cases that Petitioners cite never use the term "subordinate" in describing § 3604(f)(3)(B) nor do they state that § 3604(f)(3)(B) *only* functions as a definitional provision and does not operate as an independent prohibition. *See Regional Econ. Cmty. Action Program, Inc.*, 294 F.3d at 48 (citing with approval, *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 790 (6th Cir. 1996), which, at page 794, analyzes a reasonable accommodations violation of the FHAA by considering, exclusively, the three "operative elements" in § 3604(f)(3)(B)); *Shapiro v. Camden Towers, Inc.*, 51 F.3d 328, 335 (2d Cir. 1995) (indicating that § 3604(f)(3)(B) creates a duty to provide reasonable accommodations that is independent of § 3604(f)(2): "*Pursuant to section*

*3604(f)(3)(B)*, Cadman Towers is *required* to make reasonable accommodations in its rules and practices so as to enable Shapiro to 'use and enjoy [her] dwelling.'") (emphasis added)[3]; *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996) ("*Pursuant to § 3604(f)(3)(B)*, the Township of Brick has '*an affirmative duty*' to make reasonable accommodations on behalf of handicapped persons.") (emphasis added); *Lapid-Laurel v. Zoning Bd. of Adjustment*, 284 F.3d 442, 459 (3d Cir. 2002) ("As noted above, we have not previously addressed the 'necessity' and 'equal opportunity' factors of a *§ 3604(f)(3)(B) claim.*") (emphasis added); *Bryant Woods Inn v. Howard County*, 124 F.3d 597, 603 (4th Cir. 1997) ("The FHA thus *requires* an accommodation for persons with handicaps if the accommodation is (1) reasonable and (2) necessary (3) to afford handicapped persons equal opportunity to use and enjoy housing. *See 42 U.S.C. § 3604(f)(3).*") (emphasis added); *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996) (stating that § 3604(f)(3)(B) "defines discrimination" but not addressing whether it still operates as an independent prohibition)[4]; *Smith & Lee Assocs., Inc.*, 102 F.3d at 794

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[3] The Second Circuit made clear that § 3604(f)(3)(B) operates as an independent prohibition in *Richard Salute v. Stratford Greens Garden Apartments, a Co-Partnership*, 136 F.3d 293, 302 (2d Cir. 1998) ("Economic discrimination . . . is not cognizable as a failure to make reasonable accommodations, *in violation of § 3604(f)(3)(b)*. Accordingly, we affirm the district court's rejection of plaintiffs' claims under the 'reasonable accommodations' provision of the FHAA.") (emphasis added).

[4] In *Groome Res. Ltd, LLC v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), the Fifth Circuit stated that § 3604(f)(3)(B) (Cont'd)

(analyzing a reasonable accommodations violation of the FHAA by considering, exclusively, the three "operative elements" in § 3604(f)(3)(B)); *id.* at 795 (citing *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994) (finding an "affirmative duty" to reasonably accommodate under § 3604(f)(3)(B)), *aff'd*, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995)); *United States v. City of Palatine*, 37 F.3d 1230, 1232 (7th Cir. 1994) (accepting the plaintiff's reliance on § 3604(f)(3)(B) to show a *violation* of the FHA); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 250 (8th Cir. 1996) ("[T]he Act *requires* the City to make reasonable zoning ordinances when necessary to give a handicapped person 'equal opportunity to use and enjoy a dwelling.' *Id. § 3604(f)(3)(B)*") (emphasis added); *City of Edmonds*, 18 F.3d at 806 ("The FHAA imposes an *affirmative duty* to reasonably accommodate handicapped persons. *42 U.S.C. § 3604(f)(3)(B).*") (emphasis added); *id.* at 807 ("Many factors must be weighed to determine whether reasonable accommodation under 42 U.S.C. § 3604(f)(3)(B) was achieved."); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-02 (10th Cir. 1995) (suggesting that a reasonable accommodation claim arises under § 3604(f)(3)); *Ackerman v. Deaf and Hearing Connection of Tampa*

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(Cont'd)

operates as an independent prohibition. *See id.* at 202 ("In the scheme of the FHAA, the reasonable accommodations provision exists as a *prohibition on discrimination* against the disabled in the purchase, sale, or rental of housing. As set out in § 3604(f)(3)(B), the failure to reasonably accommodate the disabled in the context of housing is, itself, a defined act of discrimination.") (emphasis added).

*Bay, Inc.*, 197 Fed. Appx. 879, 880-81 (11th Cir. 2006) (suggesting that a claim of discrimination in the non-renewal of an apartment lease arose under § 3604(f)(1)-(2), whereas a claim of failure to reasonably accommodate a request for a roommate arose under § 3604(f)(3)(B)); and *Samaritan Inns v. District of Columbia*, 114 F.3d 1227, 1239-40 (D.C. Cir. 1997) (accepting the notion that a reasonable accommodation claim arises under § 3604(f)(3)(B)).

The *only case* that Petitioners cite that addresses § 3604(f)(3)(C) — the provision actually at issue in *Garcia* — is an unpublished decision, *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469 (6th Cir. 2006), *cert. denied, WKB Assocs., Inc. v. Fair Housing Council, Inc.*, 128 S. Ct. 880 (2008). At the time *Village of Olde St. Andrews* was decided, citation of unpublished decisions within the Sixth Circuit was *disfavored*, except for the purpose of establishing res judicata, estoppel, or the law of the case. *See* 6th Cir. R. 28(g). While citation of unpublished opinions is now permitted, *see* 6th Cir. R. 28(e), "an unpublished decision . . . is *not precedentially binding* under the doctrine of stare decisis, but is considered by [the Sixth Circuit] for its *persuasive value only*." *United States v. Sanford*, 476 F.3 391, 396 (6th Cir. 2007) (emphasis added). Accordingly, as an unpublished opinion, *Village of Olde St. Andrews* is not even binding precedent within the Sixth Circuit.

Moreover, *Village of Olde St. Andrews* has little persuasive value because it is not a well-reasoned

decision.[5] The Sixth Circuit concludes that "the statutory language of 42 U.S.C. § 3604(f) specifically makes the design and construction of inaccessible housing units unlawful *in the context of the sale or rental* of the units[,]" 210 Fed. Appx. at 481 (emphasis added), without even addressing the language of § 3604(f)(3)(C) or its textual significance. Indeed, § 3604(f)(3)(C) — the only FHA provision that specifically discusses design-and-construction discrimination — is only mentioned one time by the court, in passing; and the provision's language is not even referenced in the opinion. *See Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. at 481 ("[T]he language appearing in 42 U.S.C. § 3604(f)(1) prohibiting owners of those developments from otherwise making unavailable accessible housing serves as a catch-all provision to cover other ways that an individual may make housing unavailable to the disabled beyond the forms of discrimination listed in 42 U.S.C. § 3604(f)(3)(C).").

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[5] *Village of Olde St. Andrews* specifically holds that "the statute of limitations does not begin to run in actions alleging [that the owner or developer engaged in a policy or practice throughout the entire development of constructing housing units that fail to comply with the FHA,] until the last noncompliant unit is sold." 210 Fed. Appx. at 481. This holding is "explicitly limit[ed] . . . to the facts of th[e] case." *Id.* at 479. In addition, the case "does not address the operation of the statute of limitations in Fair Housing Act cases alleging disability discrimination in the rental of newly constructed multi-family dwellings." *Id.* at 481 n.6. Accordingly, *Village of Olde St. Andrews* narrowly applies to *policy or practice cases* involving the *sale* of multifamily dwellings.

As *Village of Olde St. Andrews* is neither binding precedent nor persuasive authority, it does not present a genuine conflict that warrants granting certiorari.[6]

Petitioners have failed to demonstrate a genuine conflict between the *Garcia* opinion and decisions of this Court and eleven other federal courts of appeal. Accordingly, this proffered reason for granting the Petition must be rejected.

## II. There is no urgent reason why this Court should grant certiorari, and the Court should wait until there is a well-developed conflict among the circuits.

Petitioners argue that the questions presented are important because "[t]he Ninth Circuit's limitation on private suits undermines the FHA's most important enforcement mechanism — private suits." (Pet. at 21.) The situation is not as dour, however, as Petitioners would have this Court believe. As the Ninth Circuit determined that the design and construction of an FHA-noncompliant building alone, without the sale or rental of individual units, is actionable under the FHA, the disabled can now bring their § 3604(f)(3)(C) claims during the design and construction phase. *See Garcia*, 526 F.3d at 461 n.1; *see also United States v. Edwards Rose & Sons*, 384 F.3d 258, 260 (6th Cir. 2004) (upholding a preliminary injunction prohibiting the construction of an inaccessible building entrance).

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[6] Indeed, this Court was aware of the *Garcia* opinion when it recently denied *Village of Olde St. Andrews* certiorari on January 7, 2008.

With reasonable diligence, disabled individuals and advocacy groups can discover an FHA-noncompliant building early on in the design and construction phase. They can monitor multifamily projects through public-approval hearings and submissions to approval boards, and they can review building plans and visit construction sites. For a four-hundred-unit apartment complex, it takes approximately twelve to eighteen months from the time the first building permit is pulled to construct an apartment and receive the final certificate of occupancy.

Accordingly, under *Garcia*, which makes the design and construction alone actionable, the statute of limitations has effectively been *extended* from two years to three or three-and-a-half years since claims can be brought well before the issuance of the final certificate of occupancy.[7] Thus, contrary to Petitioners' assertion, the Ninth Circuit's decision *does not undermine* private suits.[8] Instead, it encourages the disabled to get involved

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[7] Here, for example, Petitioner DRAC originally tested the Villas on July 25, 1997. DRAC filed its HUD complaint on October 2, 1997. The final certificates of occupancy for the Villas were not issued until October 15, 1997. Disregarding the tolling effect of the HUD complaint, under *Garcia*, the two-year statute of limitations would not have even begun to run until October 15, 1997. Accordingly, in effect, DRAC had almost twenty-seven months to bring its design-and-construction claim.

[8] Notably, remedies continue to exist after the statute has run on a design-and-construction claim: the disabled can still seek reasonable modifications and accommodations under § 3604(f)(3)(A) and § 3604(f)(3)(B), respectively; where there has been a pattern or practice of resistance to FHA rights, or a group's denial of rights raises an issue of general public

(Cont'd)

early on in the design and construction process when it is easier and less expensive for developers to remedy FHA-noncompliant features.

## III. The Ninth Circuit's reading of the FHA's statute of limitations accords with both the statute's language and the relevant non-textual considerations.

In *Garcia*, the Ninth Circuit logically began its analysis of when the statute of limitations begins to run in a design-and-construction claim under the FHA with an examination of the applicable statute of limitations:

> The FHA provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). In other words, an aggrieved person must bring the lawsuit within two years of either "the occurrence . . . of an alleged discriminatory housing practice" or

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importance, the Attorney General has three years to bring a claim for monetary damages, 28 U.S.C. § 2415(b), and five years to seek civil penalties, 28 U.S.C. § 2462; *see Garcia*, 526 F.3d at 460; *United States v. Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1143-44 (D. Idaho 2003); and the Attorney General can always bring a claim for injunctive relief. *See* 42 U.S.C. § 3614(a); *Garcia*, 526 F.3d at 460; *United States v. Inc. Village of Island Park*, 791 F. Supp. 354, 368 (E.D.N.Y. 1992).

> "the termination of an alleged discriminatory housing practice."

526 F.3d at 460-61.

### A. The Ninth Circuit correctly determined that the "discriminatory housing practice" involved in a § 3604(f)(3)(C) claim is a failure to design and construct according to FHA standards.

The Ninth Circuit reasonably concluded that in a *design-and-construction* claim, the "discriminatory housing practice" is the "'failure to design and construct' a multifamily dwelling according to FHA standards." *Id.* at 461. "The statute of limitations is thus triggered at the conclusion of the design-and construction phase, which occurs on the date the last certificate of occupancy is issued." *Id.*

The en banc majority rejected the dissent's assertion that the discriminatory housing practice at issue is the sale or rental of an FHA-noncompliant unit rather than the design and construction of the building. As § 3604(f)(3)(C) "is a coordinate section, not a subordinate section within (f)(1) or (f)(2)," the majority concluded that "treating (f)(3)(C) as subordinate makes no structural sense." *Id.* at 461 n.1. Moreover, defining the act of selling or leasing an FHA-noncompliant unit as the discriminatory housing practice "confuses the 'discrete act of alleged . . . discrimination' with the 'date when the effects of this practice were felt.'" *Id.* at 462 n.4 (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2168 (2007)). "The failure to design and construct the unit according to FHA standards is the

'underlying' discrete act of discrimination[,] . . . and the date of this underlying act 'governs the limitations period.'" *Id.* (internal citations omitted) (quoting *Ledbetter*, 127 S. Ct. at 2169 (quoting *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 911 (1989))).

### B. The Ninth Circuit properly rejected the Petitioners' theory that an FHA design-and-construction violation is a continuing one that does not terminate until the building defects are cured.

The Ninth Circuit explained that "Plaintiffs and HUD[9] confuse a continuing violation with the continuing effects of a past violation." *Garcia*, 526 F.3d at 462. The discriminatory housing "practice is 'a failure to design and construct,' which is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and-construction phase." *Id.* "Although the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failure to design and construct is a single instance of unlawful conduct." *Id.* at 463.

The court noted that if it were to adopt the continuing violation theory, "the FHA's statute of limitations would provide little finality for developers who would be required to repurchase and modify (or

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[9] The Ninth Circuit considered HUD's *Fair Housing Act Design Manual* in its analysis and gave it proper *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), weight. *See Garcia*, 526 F.3d at 462 n.3.

destroy) buildings containing inaccessible features in order to avoid design-and-construction liability for every aggrieved person who solicits tenancy from subsequent owners and managers." *Id.* "This is not what Congress provided in erecting a two-year statute of limitations for FHA design-and-construction claims." *Id.* "If Congress wanted to leave developers on the hook years after they cease having any association with a building, it could have phrased the statute to say so explicitly." *Id.*

### C. The Ninth Circuit properly rejected the Petitioners' "encounter" theory.

The Petitioners argued below that because an FHA damages action "sounds basically in tort," the statute of limitations is not triggered until a disabled person encounters the design-and-construction defect and is actually damaged by the practice. The court admonished, however, that the Petitioners "make too much of the Supreme Court's observation that the FHA 'sounds basically in tort.'" *Id.* at 464. In *Curtis v. Loether*, 415 U.S. 189, 195 (1974), the Supreme Court "was not dealing with the statute of limitations but with the very different question of whether FHA plaintiffs are entitled to a jury trial." *Garcia*, 526 F.3d at 464. "This passing reference to tort law cannot be read to trump statutory provisions that deal expressly with the statute of limitations." *Id.*

"The FHA's limitations period does not start when a particular disabled person is injured by a housing practice, but by 'the occurrence or the termination of an alleged discriminatory housing practice.'" *Id.* (quoting 42 U.S.C. § 3613(a)(1)(A)). "Under the FHA,

the ability to privately enforce the 'new legal duty' thus only lasts for two years from the time of the violation, and the violation here is a 'failure to design and construct.'" *Id.* (quoting § 3604(f)(3)(C)).

The court deemed the encounter theory further undercut by its implication that "any individual with a disability who merely observes the design-and-construction defect could bring suit-even if the limitations period had long run for every tenant and/or owner." *Id.* at 465. Further, a tester "'could always start a new clock running by returning to the building'" *Id.* (quoting Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. Rich. L. Rev. 753, 859 (2006) (footnote omitted)). "The encounter theory thus 'raise[s] serious equitable issues with respect to timeliness[]'because it strips the statute of limitations of all meaning." *Id.* (citation omitted) (quoting Schwemm, *supra*, at 859).

Accordingly, contrary to Petitioners' assertions, the FHA's language and the relevant non-textual considerations support the Ninth Circuit's construction of the statute of limitations in a design-and-construction claim. The decision below was correctly decided.

## Conclusion

There is no genuine conflict between the decision below and decisions of this Court and other federal courts of appeal. As there is no urgent reason why this Court should grant certiorari, the Court should wait until there is a well-developed conflict among the circuits. Further, the Ninth Circuit's reading of the FHA's statute of limitations is in harmony with the statutory language and the relevant non-textual considerations. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 08-140

IN THE
# Supreme Court of the United States

TAMARA THOMPSON and
DISABLED RIGHTS ACTION COMMITTEE,

*Petitioners,*

*v.*

MICHAEL E. TURK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## REPLY BRIEF

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## REPLY TO BRIEF IN OPPOSITION

### I. RESPONDENT DOES NOT DISPUTE THAT THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH NATIONALLY APPLICABLE ADMINISTRATIVE GUIDANCE.

As was noted in the Petition for a Writ of Certiorari ("Petition"), the decision of the Ninth Circuit is directly contrary to HUD's *nationally applicable* guidance (as regards the second question – which concerns the application of the "continuing violations doctrine"). Pet. at 18-21. The inconsistency with HUD's guidance was noted by the Ninth Circuit. *See, Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008). Accordingly, the Ninth Circuit's decision causes the Fair Housing Act ("FHA") to be enforced differently in eight states (California, Nevada, Montana, Idaho, Oregon, Washington, Arizona, Alaska, and Hawaii) than in the 42 other states.

The Brief in Opposition ("Opposition") is silent regarding the effect of the Ninth Circuit's decision on the consistent nationwide enforcement of the FHA. Furthermore, the Opposition fails to address Petitioners' analysis showing that HUD's guidance is consistent with the plain language of the FHA. *See* Pet. at 19-21.

## II. RESPONDENT MISUNDERSTANDS THE "IMPORTANT MATTER" AT ISSUE IN THE FIRST QUESTION PRESENTED.

This Court's rule setting forth the standards for granting writs of certiorari addresses conflicts that involve "important matters," not merely conflicts regarding any particular statutory "provision." Sup. Ct. R. 10(a). The "important matter" presented in the first question presented is whether § 3604(f)(3)(C)[1] is an independently actionable "discriminatory housing practice" or whether § 3604(f)(3)(C) merely defines a form of "discrimination" for the purposes of §§ 3604(f)(1) and 3604(f)(2).

Notably, the Opposition makes *no argument* for a structural[2] distinction between § 3604(f)(3)(B) and § 3604(f)(3)(C). Such omission is no mere oversight as *no argument can be made* to distinguish § 3604(f)(3)(B) from § 3604(f)(3)(C) in terms of the *structure* of the FHA. Instead, the Opposition disputes Petitioners' assertion that the decision of the Ninth Circuit is in conflict with *City of Edmonds v. Oxford House*, 514

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[1] All section references are to Title 42 of the United States Code unless otherwise stated.

[2] Sections 3604(f)(3)(B) and 3604(f)(3)(C), of course, describe different forms of discrimination. Accordingly, the facts in cases where the discrimination at issue is as defined at § 3604(f)(3)(B) necessarily differ from the facts of cases where the discrimination at issue is as defined at § 3604(f)(3)(C).

U.S. 725 (1995) and with decisions of various circuit courts of appeals.

Respondent seeks to characterize this Court's decision in *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995) as affording the possibility that § 3604(f)(3)(B) is "an independently-actionable discriminatory housing practice." (Oppo. at 7). In support of such conclusion, Respondent notes that this Court has referred to "prohibitions against discrimination set out in §§ 3604(f)(1)(A) and (f)(3)(B)." *City of Edmonds*, 514 U.S. at 732 n.4 and at 738. Respondent fails to note that the quoted language clearly considers the two sections as coordinated provisions -- one provision (§ 3604(f)(1)(A)) sets forth one form of an *unlawful* "discriminatory housing practice" and the other provision (§ 3604(f)(3)(B)) sets forth a relevant definition of "discrimination." In other words, the language used in *City of Edmonds* is completely consistent with the language of the statute -- and is contrary to the decision of the Ninth Circuit.

Rather than showing that the decision of the Ninth Circuit is consistent with other circuits viz-a-viz the relationship of § 3604(f)(3) to the *discriminatory housing practices* set forth at § 3604(f)(1) and § 3604(f)(2), Respondent merely shows that various circuit courts of appeals have used various terms to describe a definition of "discrimination" that serves an integral role in establishing a "discriminatory housing practice." Such terms include "an affirmative duty," and a "requirement," that can be "violated." The use of such terminology, however, does not show that a court

has treated § 3604(f)(3)(B) as *an independently actionable* "discriminatory housing practice" because "discrimination" – in and of itself – does not provide a *cause of action.* The scope of redress available for discrimination (of any sort) is limited by the terms of the relevant statute and by the Constitution.[3]

Congress can, of course, draft a statute so that "discrimination" is more than a definition, but an independent cause of action. For example, "Title VII of the Civil Rights Act of 1964 makes it an 'unlawful employment practice' to discriminate 'against any individual with respect to his compensation . . . because of such individual's . . . sex.'" *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, ___, 127 S.Ct 2162, 2166 (2007) (quoting 42 U.S.C. § 2000e-2(a)(1)). The plain language of the FHA, however, is

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[3] For example, in the context of the ADA, this Court has noted that:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908).

*Bd. Of Trustees of the Univ. Of Alabama v. Garrett*, 531 U.S. 356, 374 n. 9 (2001).

fundamentally different from Title VII because "discrimination" is not the same as a "discriminatory housing practice."

In addition to cataloging the varied terminology used by the circuit courts of appeals to describe § 3604(f)(3)(B), Respondent takes pains to minimize the practical effect of the conflict between the decision of the Ninth Circuit and *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469, 481 (6th Cir. 2006), cert. denied 128 S.Ct. 880 (2008). Oppo. at 10-11. Despite Respondent's contention, the conflict is readily apparent to federal courts. *See, e.g., Kuchmas v. Towson Univ.*, 553 F.Supp. 2d 556 (D. Md. 2008).

Finally, Respondent seeks to limit the significance of *Village of Olde St. Andrews* based upon the fact that such case concerned the "sale" of dwellings, instead of the "rental" of dwellings. Oppo. at 10-11. Section 3604(f)(3)(C), however, makes no reference to either "sales" or "rental." Respondent's suggested limitation of *Village of Olde St. Andrews* is inherently at odds with the decision of the Ninth Circuit which held that § 3604(f)(3)(C) is *an independently actionable* "discriminatory housing practice." Thus, Respondent has *emphasized* the conflict between the Ninth Circuit and the Sixth Circuit.

## III. RESPONDENT'S ARGUMENT REGARDING THE LACK OF "URGENCY" FOR GRANTING CERTIORARI DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF THE REALITIES OF ENFORCING THE FAIR HOUSING ACT.

Respondent does not dispute that private suits are the most important enforcement mechanism of the FHA. Instead, Respondent makes the remarkable assertion that the Ninth Circuit's imposition of a two year statute of repose on private suits constitutes a significant boon to the private enforcement of the FHA.

It appears that the second part of the Opposition (Oppo. at 12-14) is presented as a "public policy" argument in support of the Ninth Circuit's disregard of the plain language of the FHA. *See* Pet. at 12-14. Ironically, though, Respondent has presented a case showing that the Ninth Circuit's public policy argument is without merit.

Petitioners asserted that "a plain reading of § 3614(a) . . . shows that the Attorney General's authority to bring suit is not limited to situations where there is an 'alleged discriminatory housing practice' (as is required of private litigants under § 3613(a)(1)(A))." Pet. at 13. *United States v. Edward Rose & Sons*, 246 F.Supp.2d 744 (E.D. Mich. 2003) does not mention any "discriminatory housing practice" and the enforcement provision quoted in that opinion was § 3614(a). *Id.* at 749.

In support of its divergence from the plain

language of the FHA, the Ninth Circuit mistakenly believed that its decision would enhance the Attorney General's ability to enforce the FHA. Similarly, Respondent's own attempt to justify veering from the plain language of the FHA seeks support from supposed "benefits" to private enforcement. Such argument ignores three significant realities.

First, judicial amendment[4] of the FHA is not required for private enforcement to address discriminatory design and construction *prior to* housing being placed on the market. The FHA broadly defines an "aggrieved person" to include "any person who . . . *believes* that such person *will be injured* by a discriminatory housing practice that is *about to occur*." § 3602(i)(1) (emphasis added). Clearly, there is no need for a completed sale or rental in order for a party to bring a claim for a discriminatory housing practice under the FHA. *See, e.g., United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992) (merely "offering black testers apartments at higher rental rates than those offered to white testers discriminates in the terms of rentals and violates the [Fair Housing] Act.")

Second, the expectation that disabled persons

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[4] The fact that the Ninth Circuit's decision constitutes a judicial amendment is underscored by Respondent's own phraseology: "As the Ninth Circuit has determined that the design and construction of an FHA-non-compliant building alone, without the sale or rental of individual units, is actionable under the FHA, the disabled can *now* bring their § 3604(f)(3)(C) claims during the design an construction phase." Oppo. at 12 (emphasis added).

would have to monitor construction projects is patently unreasonable – the disabled cannot be expected to do the job that professional architects, site engineers, and builders are paid to do.

Finally, many disabled persons who are seeking accessible housing move to an area after the multifamily housing is already built or seek accessible housing after *becoming* disabled due to an accident or illness. Indeed, some (wounded soldiers, for example) may both move to an area to seek accessible housing after becoming disabled. The Ninth Circuit's statute of repose clearly limits such persons' ability to enforce the FHA.

## IV. Respondent Completely Fails To Address Petitioners' Arguments Regarding The Plain Language Of The Statute And Canons Of Statutory Construction.

Part III of the Petition ("The Decision of the Ninth Circuit in Incorrect") shows how the decision of the Ninth Circuit is clearly contrary to the plain language of the statute and to cannons of statutory construction. Pet. at 11-18.

Rather than respond to the Petition, however, Respondent simply repeats portions of the Ninth Circuit's decision along with an admixture of laudatory comments regarding the Ninth Circuit's "logic," "reason," and its efforts to "explain" and "admonish." Oppo., at 14-18.

Respondent's failure to address the arguments presented in the Petition for a Writ of Certiorari can only be interpreted as *a tacit admission* that the decision of the Ninth Circuit is incorrect.

## V. CONCLUSION

The Brief in Opposition provides additional support for granting the Petition for a Writ of Certiorari.

Respectfully submitted.

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